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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1021

JOHN H. STAHLIN and PAUL D. BAGWELL,
Petitioners,

-v-

PATRICIA ARBER, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdictional Statement	1
Questions Presented	2
Constitutional Provisions and Court Rules Involved	3
Statement of the Case	4
Reasons for Granting the Writ	
1. Summary Judgment Unconstitutionally Withheld	8
2. Summary Judgment Procedures Constitutionally Required	10
3. Public Issues vs. Celebrities	12
4. Evidence of "Actual Malice" for Summary Judgment Purposes	14
5. Absolute Privilege	15

INDEX

Page

Cases:

Arber v. Stahlin, 382 Mich. 300 (1969) 7, 12, 13

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) 8, 11

Barr v. Matteo, 360 U.S. 564 (1959) 15

Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967) 8, 14

Bennett v. Transamerican Press, 298 F.Supp. 1013 (S.D. Iowa 1969) 12

Bon Air Hotel v. Times, Inc., 295 F. Supp. 704 (S.D. Ga. 1969) 10, 12

Brandenburg v. Ohio, 395 U.S. 444 (1969) 8, 15

Cerrito v. Time, Inc., 302 F.Supp. 1071 (N.D. Calf. 1969) 10, 12

Coursey v. Greater Niles Twp. Publishing Corp., 40 Ill.2d 257, 239 N.E.2d 837 (1968) 12

Curtis Publishing Co. v. Butts, 338 U.S. 130 (1967) 8, 12, 13

Dombrowski v. Pfister, 380 U.S. 479 (1965) 8, 11

Garrison v. Louisiana, 379 U.S. 64 (1964) 8, 13, 14

Gilberg v. Goffi, 251 N.Y.S.2d 823 (App. Div. 1964), *aff'd per curiam*, 260 N.Y.S.2d 29 (1965) 12

Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969) 12

Greenbelt Cooperative Publishing Ass'n v. Bresler, October Term 1969, No. 413, *cert. granted*, ... U.S. ....., 24 L.Ed.2d 133 (1969) 15

Grosjean v. American Press Co., Inc., 297 U.S. 233 (1936) 8

Cases (Cont'd):

	Page
Hackworth v. Larson, 165 N.W.2d 705 (So. Dak. 1969)	12
Henry v. Collins, 380 U.S. 356 (1965)	8, 14
Hurley v. Northwest Publications, Inc., 398 F.2d 346 (8th Cir. 1968)	12
Klahr v. Winterble, 4 Ariz.App. 158, 418 P.2d 404 (1966)	12
Linn v. United States Plant Guard Workers of America, Local 114, 383 U.S. 53 (1966)	8
Mills v. Alabama, 384 U.S. 214 (1966)	8, 9, 11, 12, 13
N.A.A.C.P. v. Button, 371 U.S. 415 (1963)	8
News-Journal Co. v. Gallagher, 233 A.2d 166 (Del. 1967)	12
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15
Phifer v. Foe, 443 P.2d 870 (Wyo. 1968)	12
Pickering v. Board of Education, 391 U.S. 563 (1968)	8, 12, 13
Ragano v. Time, Inc., 302 F.Supp. 1005 (M.D. Fla. 1969)	12
Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367 (1969)	15
Rosenblatt v. Baer, 383 U.S. 75 (1966)	8, 13, 14
Ryan v. Dionne, 28 Con.Supp. 35, 248 A.2d 583 (1968)	12
St. Amant v. Thompson, 390 U.S. 727 (1968)	8, 14
Sellers v. Time, Inc., 299 F.Supp. 582 (E.D. Pa. 1969)	12

Cases (Cont'd):

	Page
Smith v. California, 361 U.S. 147 (1959)	8
Speiser v. Randall, 357 U.S. 513 (1958)	8, 11
Stanley v. Georgia, 394 U.S. 557 (1969)	8, 15
Suchomel v. Suburban Life Newspapers, Inc., 40 Ill.2d 32, 240 N.E.2d 1 (1968)	12
Tagawa v. Maui Publishing Co., 448 P.2d 337 (Hawaii 1968), *cert. denied*, ... U.S. ....., 24 L.Ed.2d 73 (1969)	13
Thompson v. Evening Star Newspaper Co., 394 F.2d 774 (D.C. Cir.), *cert. denied*, 393 U.S. 884 (1968)	10, 12, 13
Thornhill v. Alabama, 310 U.S. 88 (1940)	8
Time, Inc. v. Bon Air Hotel, ... F.2d ..... (5th Cir), *cert. denied*, 393 U.S. 859 (1968)	12
Time, Inc. v. Hill, 385 U.S. 374 (1967)	8, 11, 12, 13
Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969)	10, 12, 13
United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969)	12, 13
Walker v. Pulitzer Publishing Co., 394 F.2d 800 (8th Cir. 1968)	12
Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966) *cert. denied*, 385 U.S. 1011 1967)	10, 12
Watts v. United States, 394 U.S. 705 (1969)	14, 15

Statutes:

Interlocutory Appeals Act, 28 U.S.C. §1292 (b)	10
28 U.S.C. §1257(3)	2

Miscellaneous:

	Page
Michigan General Court Rule (1963) 117.2(3) and 117.3	4, 5
Note, *The Chilling Effect in Constitutional Law*, 69 Colum.L. Rev. 808 (1969)	11
U. S. Const. Amend. I	3, 8
U. S. Const. Amend. XIV, §1	3, 8

IN THE SUPREME COURT OF THE UNITED STATES

October Term. 1969

No. ----------

JOHN H. STAHLIN and PAUL D. BAGWELL, *Petitioners*

v.

PATRICIA ARBER, et al., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

The petitioners John H. Stahlin and Paul D. Bagwell respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Michigan entered in these proceedings on September 3, 1969.[1]

OPINIONS BELOW

The opinion of the Supreme Court of Michigan is reported at 382 Mich. 300. The opinion of the Michigan Court of Appeals is reported at 10 Mich. App. 181. The opinion of the trial court is unreported. These opinions are attached in Appendices A, B, and C (pp. 1a-64a).

JURISDICTION

The judgment of the Supreme Court of Michigan was entered on September 3, 1969. A timely application for re-

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1. Respondents are Patricia Arber, Allan B. Clink, Gerald A. Pias, Palmer T. Heenan, Karl Lady and George M. Zimmerman.

hearing was denied on October 6, 1969, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

The issues presented relate to the impact of First and Fourteenth Amendment principles upon state court procedures in civil libel litigation. The collision occurs because petitioners' access to Michigan's summary judgment procedure for the purpose of vindicating federally protected rights has been severely curtailed. Respondents, who admit to being active politically, active supporters of a candidate for party office and members of political groups who had urged persons of their persuasion to become effectual in a political party, claim to have been libeled by a publication concerning their knowledge of improper electioneering on the part of the groups to which they belong, the alleged purpose of which was to drive them out of politics. In advance of a trial of the case, the following questions have been raised and finally determined in the court below.

1. Does a state court's refusal to apply established *New York Times Co. v. Sullivan* standards in reversing a grant of summary judgment in favor of libel defendants violate Fourteenth Amendment principles of due process of law, where such summary judgment had been granted below on the ground that there was no genuine dispute as to a material fact because the plaintiffs had failed to approach the issue of "actual malice"?

2. Does *New York Times* require that state court summary judgment procedures be made available to libel defendants in order to provide an early opportunity to test whether or not further proceedings are really warranted, in view of the chilling effect such litigation may have upon the free exercise of the First Amendment rights?

3. Does the rule of the *New York Times* case apply in libel proceedings brought by the supporters of a

candidate for political party office, where the allegedly libelous document charges such persons with knowledge of improper electioneering activities — matters of pressing public controversy — in the absence of a showing that such supporters are widely known in the community?

4. Consistent with the *New York Times* rule, can the existence of a dispute as to actual malice (so as to deny a motion for summary judgment) be based upon no more than the vitriolic character of charges of improper electioneering, the hurried publication thereof, and the possibility that a jury might disbelieve testimony that the defendants in good faith believed the charges to be true?

5. Do the First and Fourteenth Amendments absolutely bar a civil libel jury trial and judgment against the leaders of a political party who receive and transmit to a Fair Campaign Practices Commission reports of improper electioneering activities and the names of persons who are believed to have knowledge of them?

CONSTITUTIONAL PROVISIONS AND COURT RULES INVOLVED

The constitutional provisions involved are the First Amendment and Section 1 of the Fourteenth Amendment to the United States Constitution.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., amend. I.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, §1.

The state court rule involved is Michigan General Court Rule (1963) 117.2(3) and .3:

> ".2 Grounds. The motion for summary judgment shall state that the moving party is entitled to judgment in his favor because of any one of the following grounds:
>
> . . .
>
> (3) that except as to the amount of damages there is no genuine issue as to any material fact, and the moving party is therefore entitled to judgment as a matter of law.
>
> . . .
>
> .3 Motion and Proceedings Thereon . . . . Judgment shall be rendered forthwith if the pleadings show that any party is entitled to judgment as a matter of law or if the affidavits or other proof show that there is no genuine issue of fact. . . ."

STATEMENT OF THE CASE

In 1962, a conflict arose within the Michigan Republican Party concerning what some persons viewed as extremist elements within the organization. On one side stood one Richard Durant and an active group of party members loyal to him, six of whom are the respondents. On the other side were a number of leaders of the party, two of whom are the petitioners. John H. Stahlin was a state senator and candidate for lieutenant governor, and Paul D. Bagwell was a former candidate for governor and was the titular head of the party. Respondents have alleged

that the latter group, including petitioners, were attempting to oust the former from the party organization.

The alleged libel is contained in a letter and complaint dated May 10, 1962, from petitioner Stahlin to the Michigan Fair Campaign Practices Commission. It charged that respondents were members of various extremist groups which were attempting to seize control of the Republican Party organization in Wayne County [Detroit], Michigan, through bribery, intimidation, misrepresentation and threats of physical violence. These activities were designated a "movement" by "certain extremist groups" and respondents were named as "individuals with knowledge of the movement" according to the groups with which they were said to be associated. The document, Exhibit A, was released to the press (R, page 24a.)[2]

On May 8, 1963, respondents commenced these six libel actions in the Circuit Court for the County of Wayne against petitioners and others. The complaints were substantially identical. Each plaintiff alleged that, "he has been and now is active politically" (R, page 9a); that he "has urged conservatives to become active in politics and to become more effectual and influential in the Republican Party" (R, page 15a); that the publication made was calculated "to stir up the public against the plaintiff and drive plaintiff out of politics as an active member of the Republican Party" (R, page 21a); and that its purpose was to drive him out of political activity (R, pages 10a and 23a).

Petitioners filed motions for summary judgment in the trial court pursuant to Michigan General Court Rule 117.2(3), quoted above, on the grounds that the publication was both absolutely and qualifiedly privileged under the First and Fourteenth Amendments and that they had acted without malice as a matter of law.

Petitioners' motions were accompanied as required by their affidavits. Respondents filed the affidavit of Charles Ferry, a former Administrative Assistant to petitioner Stahlin and a defendant in these same cases against whom a default judgment had been taken. Petitioner Stahlin's affidavit (App. C, page 51a) set forth his reasons for mak-

2. "R" designates the printed Appendix on Appeal in the Michigan Supreme Court, which has been certified to this Court as part of the record below.

ing the charges and his belief that the statements were true and the allegations accurate. Petitioner Bagwell's affidavit (App. C, page 52a) set forth in detail that the charges were communicated to him by reliable sources, that he had discussed the charges with petitioner Stahlin, and that he had given petitioner Stahlin retyped copies of certain documents given to him by reliable party leaders for the purpose of causing an investigation by the Fair Campaign Practices Commission. The Ferry affidavit (App. C, page 57a) stated that Exhibit A's purpose was to "get" Durant and his supporters. But it also established that the statements were believed to be true by petitioner Stahlin and Ferry himself; that numerous checks were made to insure their accuracy; and that numerous high ranking members of the party had confirmed their accuracy and were conducting further investigation. Petitioners' motions were granted.

The trial court found that: (1) the alleged libel grew out of a political controversy within the Republican Party organization;[3] (2) petitioners and the other defendants were engaged in a political battle;[4] (3) respondents "were public men engaged in matters of public concern";[5] so that (4) petitioner Bagwell's delivery of the charges and petitioner Stahlin's publication of them were qualifiedly but not absolutely privileged under *New York Times Co. v. Sullivan.*[6]

The trial court also found that the Ferry affidavit, submitted by respondents, "negates any concept of malice as defined in *Times v. Sullivan.* On the contrary, the affidavit establishes rather conclusively . . . that these defendants did not know that the contents of the exhibit were false, nor did they conduct themselves in utter and reckless disregard of the truth or falsity of the contents of the document."[7] Accordingly, it held that there was no genuine issue of material fact concerning whether petitioners

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3. Appendix A, *infra*, at 6a.
4. *Id.* at 30a.
5. *Id.* at 20a.
6. *Id.* at 28a.
7. *Id.* at 33a.

acted with actual malice and granted their motions for summary judgment.

The Michigan Court of Appeals affirmed the summary judgment for petitioners on identical grounds, also relying upon *New York Times*.[8]

On September 3, 1969, the Michigan Supreme Court unanimously reversed the judgments of the lower courts, vacated the entry of summary judgment and remanded the cases for further proceedings. The opinion of the Michigan Supreme Court is set forth in Appendix C below[9] and is noteworthy in three respects:

1. The court purported not to decide whether the publication fell within the protection of the *New York Times* qualified privilege.[10]

2. After stating the matter to be "not dispositionally relevant to the case", the court ruled that "nothing in the present record indicates that plaintiffs were in fact public figures", on the theory that such a term is synonymous with "celebrity".[11]

3. The court found that a dispute existed as to actual malice because: (a) the issue of malice cannot be determined to be absent until after a jury has assessed the credibility of the witness who denies malice;[12] (b) a jury might conclude that the purpose of the publication was to "get" Durant and that there was no concern whatever either for respondents or for their actual participation in the Durant campaign;[13] (c) the charges published were the "type

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8. Appendix B, *infra*, at 36a.

9. *Infra*, at 41a.

10. "This Court is requested — principally upon the authority of *New York Times Co. v. Sullivan* — to draw the fine line between speech unconditionally guaranteed and speech which may legitimately be regulated (see *Speiser v. Randall*, (1958), 357 U.S. 513, 525). This we cannot do.

"The sole issue before this Court is whether summary judgments were properly or improperly granted. We hold that summary judgments were improperly granted." Arber v. Stahlin, 382 Mich. 300, 305 (1969); Appendix C, *infra*, at 44a.

11. 382 Mich. at 305 n. 4; Appendix C, *infra*, at 45a.

12. Appendix C, *infra*, at 47a.

13. *Id.*

of news which by its very nature requires careful verification"[14] and also that "the hurried publication" might be indicative of reckless disregard of whether the material was true or not.[15]

Petitioners promptly applied for rehearing. The First and Fourteenth Amendments grounds asserted may be summarized as follows: (1) The decision unduly circumscribed the application of *New York Times*. (2) Denial of summary disposition imposed an impermissible chilling effect on freedom of speech. (3) The state erred in refusing to perform its duty to determine the applicability of and compliance with *New York Times* standards on summary disposition. (4) The decision erroneously construed the actual malice test laid down in *New York Times*. (5) Petitioners were absolutely privileged to deliver or publish the charges they had received. Petitioners' applications for rehearing were denied.

REASONS FOR GRANTING THE WRIT

The Michigan Supreme Court decided a federal question of substance in a way probably not in accord with applicable decisions of this Court.[16]

1. The Michigan Supreme Court refused to apply established *New York Times* standards in assessing the record at the summary judgment stage of the proceedings. The *New York Times* rule makes actual malice an issue of fact

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14. *Id.* at 46a.

15. *Id.* at 47a.

16. The basic decision is, of course, New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The others to which petitioners refer include Brandenburg v. Ohio, 395 U.S. 444 (1969); Stanley v. Georgia, 394 U.S. 557 (1969); Pickering v. Board of Education, 391 U.S. 563 (1968); St Amant v. Thompson, 390 U.S. 727 (1968); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 374 (1967); Mills v. Alabama, 384 U.S. 214 (1966); Rosenblatt v. Baer, 383 U.S. 75 (1966); Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53 (1966); Dombrowski v. Pfister, 380 U.S. 479 (1965); Henry v. Collins, 380 U.S. 356 (1965); Garrison v. Louisiana, 379 U.S. 64 (1964); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); N.A.A.C.P. v. Button, 371 U.S. 415 (1963); Smith v. California, 361 U.S. 147 (1959); Speiser v. Randall, 357 U.S. 513 (1958); Thornhill v. Alabama, 310 U.S. 88 (1940); Grosjean v. American Press Co., Inc., 297 U.S. 233 (1936).

to be proven by a libel plaintiff as part of his case-in-chief, and, therefore, a defendant's motion for summary judgment in Michigan libel proceedings necessarily draws into issue the applicability of, and compliance with, *New York Times* standards. The decision below, however — that reference to *New York Times* standards is inappropriate at the summary stage of civil libel litigation — is not only erroneous; its effect will be to substantially restrict the constitutional protection which *New York Times* and related cases afford to those who would speak out critically of political issues and persons of political prominence.

The urgent issue before this Court is thus whether, in the course of state libel litigation, the state must permit the defendant to avail himself of constitutional protections at an early stage. So stated, it is at once apparent that such an issue can reach this Court only in a case in which summary judgment has been denied below;[17] and further, that adherence to the traditional view that a denial of summary judgment is not a final judgment means that the decision below would immunize itself from further review.[18] In effect, therefore, the decision of the Michigan Supreme Court *is* final, both in the sense that it denies a substantial federally protected right — i.e., the right to speak honestly on public issues without fear of libel prosecution — and that it prevents the entry of any later judgment on the same issue from which an effective appeal may be taken.

There has developed within the federal court system a rule to the effect that "the failure to dismiss a libel suit

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17. Where summary judgment has been granted in favor of a libel defendant, the inquiry on review can only be whether or not it is proper to apply the *Times* rule at the summary judgment stage of state court proceedings; on the other hand, it is only in the case of a denial of summary judgment (traditionally not a final judgment) that the issue can be whether or not it is constitutionally permissible to withhold application of the *Times* rule at the summary judgment stage of the proceedings.

18. In the present case, as in Mills v. Alabama, *supra*, note 16, the trial court granted summary judgment in petitioners' favor on federal constitutional grounds — a final judgment. The intermediate appellate court affirmed, also on constitutional grounds — also a final judgment. The Michigan Supreme Court reversed, also on constitutional grounds, and for the first time the judgment lacks finality in the traditional sense, even though it constitutes a precedent binding on the courts of Michigan. The effect is to postpone until after trial petitioners' right to the protection of the *Times* rule, to immunize that decision from review and to render moot any later attempt to obtain federal consideration of the matter.

might necessitate long and expensive proceedings, which, if not really warranted, would themselves offend . . . [constitutional] principles . . . because of the chilling effect of such litigation."[19] However, appellate cases have been conducted under the provisions of 28 USC §1292(b) — the Interlocutory Appeals Act — which authorizes review of certain orders not otherwise appealable, a provision which has no applicability in state courts and which has precluded a decision in federal courts to the effect that a denial of summary judgment may in an appropriate case be a final judgment. Thus, absent this Court's ruling that *New York Times* must be applied in state court libel proceedings at the summary judgment level, the availability of summary judgment will depend upon a libel defendant's ability to have the case heard in federal court. Given the same libel law, the same federal constitutional requirements as to a showing of actual malice, and virtually identical summary judgment procedures, there is no justification whatever for a disparity between federal and state court proceedings as to when federal constitutional guarantees may first be availed of; yet, absent some statement by this Court in this case, such will be irrevocably the case in Michigan.

2. This Court should consider the larger question of whether effective implementation of the *New York Times* rule requires that in cases arising out of public or political criticism state courts must provide libel defendants with some means of requiring the plaintiff to demonstrate, early in the proceedings, that some evidence responsive to the requirements of the *New York Times* case is present. Failure to provide such a procedure could have a chilling effect upon the free exercise of sensitive First Amendment rights which would itself render the *Times* rule impotent.

At present, the prospect of arduous and expensive libel litigation provides the basis for a potent harassment technique in the hands of private censors who may desire

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19. Time, Inc. v. McLaney, 406 F.2d 565, 566 (5th Cir.), *cert. denied* 395 U.S. 922 (1969). See Thompson v. Evening Star Newspaper Co., 394 F.2d 774 (D.C. Cir.), *cert. denied* 393 U.S. 884 (1968); Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied* 385 U.S. 1011 (1967); Cerrito v. Time, Inc., 302 F.Supp. 1071 (N.D. Calif. 1969); Bon Air Hotel v. Time, Inc., 295 F. Supp. 704 S.D. Ga. 1969).

to silence criticism of the electoral process or its participants. Despite this Court's disapproval of such techniques,[20] the right to summary disposition of unwarranted libel cases has not yet been established as part of the constitutional protection against private censorship. This is all the more significant in view of the extent to which this Court has felt constrained to establish protection against the chilling effects wrought by official censorship on related First Amendment rights.[21] Since the burden of defending a civil libel action is as great or greater than that involved in defending a criminal prosecution, the court should act to establish similar protections for the civil libel defendant.

It is unnecessary and perhaps impossible to detail the harassing effects of the multiple libel suits brought against petitioners and others as a result of the identical political controversy and publication. It might be noted, however, that the cases presently before this Court are but six of nine related cases petitioners have defended in which a total of eleven plaintiffs have sued a total of sixteen defendants claiming aggregate damages of $12,300,000. All of the defendants were persons active in the Republican Party leadership in Michigan.[22] These cases have been pending for six and one-half years; and seven cases are still pending against petitioners and at least three other de-

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20. 376 U.S. at 279; 385 U.S. at 389.

21. In *Dombrowski*, the fear of defending criminal prosecutions was recognized and the prosecutions were enjoined. In *Bantam Books*, the prospect of prosecution under obscenity laws was the basis for an injunction against more informal methods of censorship. In *Speiser*, the Court dispelled the fear of proving lawfulness of conduct by invalidating a state procedure which threw the burden of proving non-advocacy of violence upon the taxpayer. In *Mills*, the Court ordered summary dismissal of a criminal prosecution for electioneering. The Court has made it clear that it is the fact of the litigation or prosecution, apart from the probable outcome, from which the prohibited chilling effects are derived, 380 U.S. at 186. See generally, Note, *The Chilling Effect in Constitutional Law*, 69 Colum. L. Rev. 808 (1969).

22. The others named as defendants in these cases along with petitioners were: Charles Ferry (aide to Senator Stahlin); Norman O. Stockmeyer (Wayne County Republican Chairman); Wilbur Brucker, Sr. (former Governor and Secretary of the Army); Karl B. McKeehan (13th District Board Member); George Bashara, Jr.; George Romney (candidate for Governor); Richard VanDusen (advisor to Governor Romney); Charles King (Dean, Detroit College of Law); Robert Waldron (member, Michigan House of Representatives); Allen Merrill (Vice President, Ford Motor Company); Arthur Elliott (state Republican chairman); Martin Hayden (newspaper editor); and the Evening News Association. Fifteen other active Republicans were named as co-conspirators but not as defendants.

fendants, in which the aggregate damages claimed exceed $2,000,000.[23]

The question of the right to summary disposition constantly arises in the course of libel litigation and is one of great importance in the administration of such laws.[24] Because a grant of summary judgment, however, need not be grounded upon constitutional standards[25] and because review of a case arising in federal court might be made on the basis of an exercise of this Court's supervisory powers over such federal courts, the present case provides this Court with a unique opportunity to give meaning and effect to its decision in the *New York Times* case.

3. Although the *New York Times* doctrine has been applied to "public figures" and matters of public interest, importance, and concern,[26] it has not yet been applied in a civil libel action where the plaintiff was not widely known, but where the publication concerned a matter of pressing public controversy. This Court should so apply it here — in a libel action involving a publication which

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23. While this petition comes to the Court on a record consisting of only five affidavits, this is not because Respondents' attorney has been without extensive, time-consuming and costly discovery devices. Over a period of two years, the plaintiff in a related case, also represented by Respondents' attorney, took the depositions of nineteen persons on twenty-seven different days. The persons examined included petitioners, who were examined on four occasions altogether, and every co-defendant in these six cases.

24. See cases cited note 19 *supra*. See also, United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc, 404 F.2d 706 (9th Cir. 1968), *cert. denied* 394 U.S. 921 (1969); Hugley v. Northwest Publications, Inc., 398 F.2d 246 (8th Cir. 1968); Walker v. Pulitzer Publishing Co., 391 F.2d 800 (8th Cir. 1968); Sellers v. Time, Inc., 299 F. Supp. 582 (E.D. Pa. 1969); Bennett v. Transamerican Press, 293 F. Supp. 1013 (S.D. Iowa 1969); Klahr v. Winterble, 1 Ariz. App. 158, 118 P.2d 401 (1966); Ryan v. Dionne, 28 Conn. Supp. 35, 248 A.2d 583 (1968); News-Journal Co. v. Gallagher, 233 A.2d 166 (Del. 1967); Tagawa v. Maui Publishing Co., 448 P.2d 337 (Hawaii 1968), *cert. denied* ... U.S. ..., 24 L.Ed. 2d 73 (1969); Suchomel v. Surburban Life Newspapers, Inc., 40 Ill. 2d 32, 240 N.E.2d 1 (1968); Gilberg v. Goffi, 251 N.Y.S.2d 323 (App. Div. 1964), aff'd per curiam, 260 N.Y.S.2d 29 (1965); Hackworth v. Larson, 165 N.W.2d 705 (So. Dak. 1969); Phifer v. Fee 445 P.2d 870 (Wyo. 1968). Compare Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969); Time, Inc. Bel Air Hotel, ... F.2d ... (5th Cir.) *cert. denied* 393 U.S. 859 (1968); Ragano v. Time, Inc., 302 F.Supp. 1005 (M.D. Fla. 1969); Coursey v. Greater Niles Twp. Publishing Corp., 40 Ill. 2d 257, 239 N.E. 2d 837 (1968); and the case below, Arber v. Stahlin, 382 Mich. 300 (1969).

25. Since the question at the summary judgment stage of the proceedings is whether a dispute exists as to any material fact, the determination may well be made without specific reference to constitutional doctrine, particularly if the motion is denied.

26. See Pickering v. Board of Education, 391 U.S. 563 (1968); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 374 (1967); Mills v. Alabama, 384 U.S. 214 (1966).

charged a party candidate's active supporters with knowledge of improper electioneering, a matter plainly in the public domain — without regard to whether the supporters criticized are widely known or "celebrities" in the community.

Because of explicit language in *New York Times*,[27] *Garrison*,[28] *Rosenblatt*,[29] *Hill*,[30] *Butts*,[31] petitioners asserted below that the constitutional concept of "public figure" embraced persons who were involved in matters of "public concern", e.g., the electoral process.[32] The Michigan Supreme Court, however, stated that "nothing in the record indicates that plaintiffs were in fact public figures", and dismissed the trial court's finding as "unsupported by the proofs necessary to make such a finding of fact."[33] The effect of such statements, even though termed "not dispositionally relevant", is equivalent to a judgment, binding on the trial court, that *New York Times* will not apply unless petitioners come forward with a showing that respondents were public figures in the traditional tort sense — i.e., "celebrities." Petitioners have heretofore relied upon the admissions contained in the complaints in these cases to the effect that respondents were active politically in the Republican Party and had encouraged others to become active politically and had urged persons of particular political persuasion to join political groups; and petitoners presently have no further proofs to offer on this issue. This means petitioners will be unable to assert the *New York Times* privilege at trial in the not unlikely

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27. 376 U.S. at 269.

28. 379 U.S. at 74.

29. 383 U.S. at 86.

30. 385 U.S. at 387.

31. 388 U.S. at 150, 152.

32. "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated and all such matters relating to political processes." Mills v. Alabama, 384 U.S. 214, 218 (1966). See Pickering v. Board of Education, *supra* note 26; Thompson v. Evening Star Newspaper Co., 394 F.2d 774 (D.C. Cir. 1968) (active supporters of a candidate for public office within *Times* rule). See also Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969); United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., 404 F.2d 706 (9th Cir. 1968).

33. 382 Mich. at 305 n.4; Appendix C, *infra*, at 45a.

event that the trial court adheres to the ruling contained in the opinion below.

Application of *New York Times* is both logical and necessary in the present case if the principle that "debate on public issues should be uninhibited, robust, and wide-open"[34] extends to political campaigns. Unless and until *New York Times* applies to matters plainly in the public domain, public discussion of the electoral process at the grass roots level will remain cautious, self-censored, and circumscribed by the threat of a libel suit. This Court should declare that the scope of the freedom to criticize that process and those participating in it should not depend on the "celebrity"-type status of the participants.

4. The Michigan Supreme Court's determination that a genuine issue or jury finding of actual malice might be based on the vitriolic character of the charges, the "hurried publication" thereof, the evidence of political opposition, and the possibility that a jury might disbelieve petitioners' testimony that they believed the charges to be true, is not in accord with this Court's decisions in *New York Times*, *Garrison*, *Henry*, *Rosenblatt*, *Beckley Newspapers*, or *St. Amant*. Criticism of public figures is protected whether or not it is "vehement, caustic, and sometimes unpleasantly sharp"[35] or even "vituperative, abusive, and inexact".[36] It is protected whether or not it is carefully verified[37] and whether or not the critic bore hostility toward or was politically opposed to the person criticized.[38] It does not and cannot matter whom the jury believes if the evidence does not permit "the conclusion that defendant in fact entertained serious doubts as to the truth of his publication",[39] as the evidence here does not. On the record, no evidence has been offered by respondents at all on the

34. New York Times Co. v. Sullivan, *supra* note 16 at 270.

35. 376 U.S. at 270.

36. Watts v. United States, 394 U.S. 705, 708 (1969).

37. 376 U.S. at 287; 390 U.S. at 731.

38. 383 U.S. at 84.

39. 390 U.S. at 731.

issue of malice, so that it is inconceivable that a dispute exists.[40]

5. This Court should determine that the public's interests in information about the electoral process is so vital to democratic government, and protection of freedom of political expression, association and activity are so vital to democratic government, that petitioners' activity here must be absolutely privileged and immune from regulation by a state through its civil libel laws. Resolution of this question will involve: (1) determining the applicability of principles announced last term to state civil libel actions[41] and (2) determining generally the extent to which the doctrines announced in state obscenity, syndicalism, seditious libel, and other criminal prosecutions are applicable in civil libel suits.[42] Petitioners suggest that under the decision below, every act undertaken by responsible party leaders in order to investigate charges of improper electioneering can be made the predicate of a state civil libel trial and judgment. Such a result cannot stand; and the interest in having such activity free and unhampered is so vital that it must be protected absolutely.[43]

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40. With reference to the Michigan Supreme Court's reliance on the character of the material and the "hurried publication", it should be noted that similar questions are present in Greenbelt Cooperative Publishing Ass'n v. Bresler, October Term 1969, No. 413, *cert. granted* ___ U.S. ___, 24 L.Ed. 2d 133 (1969). This petition might well be considered concurrently with, or following, a decision in *Greenbelt*.

41. These principles include: (1) the immunization against state regulation of receipt and possession of information and ideas [Stanley v. Georgia, 394 U.S. 557 (1969) (obscenity prosecution)] and mere advocacy or association with others to advocate political action [Brandenburg v. Ohio, 395 U.S. 444 (1969) (syndicalism prosecution)]; (2) the public's right to access to information concerning the electoral process and other public issues [Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367 (1969)] and (3) the protected character of political hyperbole [Watts v. United States, 394 U.S. 705 (1969)].

42. See New York Times Co. v. Sullivan, 376 U.S. 254, 269, 277 (1964).

43. Cf. Barr v. Matteo, 360 U.S. 564 (1959).

CONCLUSION

For the foregoing reasons, petitioners submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

_____

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_____

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APPENDICES

TABLE OF CONTENTS TO APPENDICES

	Page
Appendix A — Opinion of the Wayne County Circuit Court (Filed December 29, 1966)	1a-35a
Appendix B — Opinion and Order of the Michigan Court of Appeals	36a-40a
Appendix C — Opinion and Order of the Supreme Court of Michigan	41a-64a
Affidavit of John H. Stahlin	51a-52a
Affidavit of Paul D. Bagwell	52a-55a
Affidavit of Charles Ferry	57a-64a

APPENDIX A

OPINION OF THE WAYNE COUNTY CIRCUIT COURT

(Filed December 29, 1966)

PATRICIA ARBER,
Plaintiff,
-v-
JOHN H. STAHLIN, et al.,
Defendants.

Civil Action No. 6431

ALLAN B. CLINK,
Plaintiff,
-v-
JOHN H. STAHLIN, et al.,
Defendants.

Civil Action No. 6486

GERALD A. PLAS,
Plaintiff,
-v-
JOHN H. STAHLIN, et al.,
Defendants.

Civil Action No. 6428

PALMER T. HEENAN,
Plaintiff,
-v-
JOHN H. STAHLIN, et al.,
Defendants.

Civil Action No. 6429

KARL LADY,
Plaintiff,
-v-
JOHN H. STAHLIN, et al.,
Defendants.

Civil Action No. 6432

GEORGE M. ZIMMERMAN,
Plaintiff,
-v-
JOHN H. STAHLIN, et al.,
Defendants.

Civil Action No. 6267

At a session of said Court, held in the City-County Building, Detroit, Michigan, on the 28th day of December, A.D. 1966.

Present: Hon. Joseph G. Rashid, Circuit Judge.

Presently before this Court are eight cases for libel brought by ten individual plaintiffs against several and various defendants. In seven of such cases, some of the defendants have moved this Court for summary judgment under General Court Rule 117. These cases are as follows: Zimmerman v. Stahlin, et al., No. 6267; Plas v. Stahlin, et al., No. 6428; Heenan v. Stahlin, et al., No. 6429; Arber v. Stahlin, et al., No. 6431; Lady v. Stahlin, et al., No. 6432; Clink v. Stahlin, et al., No. 6486; and, Robbins, et al., v. Stahlin, et al., No. 6525.

One case, arising out of this same transaction, i.e., Richard Durant, plaintiff, v. John H. Stahlin, et al., cause No. 328-488, is not under consideration at this writing, no such motion having been filed by any of the defendants in that case, except defendant Stockmeyer.

In five of the cases, the Evening News Association and Martin S. Hayden, are named defendants (Martin Hayden is in only two cases). These cases are as follows: Plas v. Stahlin, et al., No. 6428; Heenan v. Stahlin, et al., No. 6429; McDonnell v. Stahlin, et al., No. 6430; Arber v. Stahlin, et al., No. 6431; Lady v. Stahlin, et al., No. 6432 and Clink v. Stahlin, et al., No. 6486.

Defendant, Evening News Association, hereinafter referred to as the News, and Martin S. Hayden, move for summary judgment under Rule 117.2 (1), alleging that the opposing party has failed to state a claim upon which relief can be granted.

In all of these cases, plus that of George M. Zimmerman, plaintiff, Civil Action No. 6267, defendants John H. Stahlin, Paul Bagwell and defendant Norman Stockmeyer, seek summary judgment in accordance with Rule 117.2 (3), claiming that except as to the amount of damages, there is no genuine issue as to any material fact, and therefore, are entitled to judgments as a matter of law.

Defendant Norman Stockmeyer moves for summary judgment, as did defendants News and Martin Hayden, pursuant to Rule 117.2 (1), claiming that the plaintiff has

failed to state a claim upon which relief can be granted. It is to be noted here, however, that defendant Stockmeyer moved for summary judgment in Durant, plaintiff, v. Stahlin, et al., civil action 328-488. That motion is not to be decided at this writing.

The complaints in these actions were filed in May of 1963, and in the main, contain identical or at least similar allegations. It is contended upon the part of the plaintiffs that the defendants herein, acting in association, jointly and severally, with malice, evil and ill will, and intending to ruin plaintiffs' good name and reputation, and particularly drive them out of political activity, published a certain eight page document marked "Exhibit A".

Plaintiff, in each case, contends that defendants, unlawfully and maliciously, charged the said plaintiff with certain infamous illegal unpatriotic criminal acts and offenses, and alleges further that the said defendants knew the same to be false, but calculated and intended to do the plaintiff in each case harm and injury.

The plaintiff in each case further alleges that the defendants, jointly and severally, with malice, evil and ill will, and intending to ruin plaintiff's good name and reputation, and particularly drive him out of political activity, not only published the offensive document, but with malice, did cause copies of the same to be sent to the Michigan Election Fair Practices Commission, and in fact, to each individual member of the Commission.

The plaintiff in each instance also charges that the defendants furnished copies of the said libelous document to the Metropolitan Newspapers of Detroit, namely, the Detroit News and the Detroit Free Press. The remaining portions of each complaint describes the document in detail, making specific reference to its contents. "Exhibit A" is attached to each complaint. For purposes of clarity and orderly presentation, this Court will pass upon the motions filed by defendants News and Martin S. Hayden first.

Martin Hayden is defendant in two cases: Heenan, 6429 and Clink, 6486, only.

The sole question presented by defendants News and Hayden is whether or not plaintiffs in these causes have asserted a cause of action in the complaint as filed.

Since the filing of these actions in 1963, the United States Supreme Court, the Michigan Supreme Court and other courts throughout the country, have rendered decisions and opinions which have recast the law of libel and defamation.

It is urged by defendants News and Martin Hayden that the publication was privileged as a matter of law. In the light of these recent opinions and decisions, this Court will examine these complaints to ascertain whether, as a matter of law, plaintiffs herein have, by way of such complaint, established a cause of action.

It may be noted that defendants News and Hayden do not urge absolute privilege, but rather a qualified privilege, so-called.

Absolute privilege is confined to cases in which the public service or the administration of justice requires complete immunity from being called to account for language used. It applies more directly to matter of public concern, such as language used in legislative, judicial and executive proceedings. A communication absolutely privileged, as for example, are words spoken by a judge in his judicial capacity in a court of justice. A report or statement is rendered privileged by a member of the legislature. Such words or reports are not actionable, though made maliciously.

A publication is conditionally or qualifiedly privileged where circumstances exist, or are reasonably believed by the defendant to exist, which cast on him the duty of making a communication to certain other persons to whom he makes such communication in the performance of duty, or where the person is so situated that it becomes right in the interest of society that he should tell third persons certain facts which he in good faith proceeds to do.

It has been well established in the law of this state and of the United States that it is for the Court to determine whether a qualified privilege exists as a matter of law. This is not a fact question. Accordingly, the court must examine all of the circumstances and the allegations in plaintiff's complaint to ascertain whether or not defendants News and Hayden were protected in the alleged publication by reason of the asserted privilege (Lawrence v. Fox, 357 Mich. 134; New York Times v. Sullivan, 376 U.S. 254; 11 L. Ed. 2d 686).

Justice Smith of the Michigan Supreme Court, in Lawrence v. Fox, 357 Mich. 134, at page 139 discusses the question of privilege as follows:

> "Considerations of social policy similar in principle, but of lesser intensity, result in a privilege not absolutely but conditional, or, as sometimes put, qualified, or defeasible. These situations are of great variety, * * *. A publication is privileged when it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. These are the occasions in which one has not an absolute but a limited immunity to speak or publish words in and of themselves defamatory. What circumstances then, present this occasion of qualified privilege?
>
> "These are not new to our Court * * *", writes Justice Smith.
>
> "In Boserman v. Detroit Free Press, 287 Mich. 443, we described the term 'occasion' as meaning the 'extrinsic' situation presented. In that case, as the Court pointed out, 'the extrinsic circumstances' in the instant case are that defendant's Newspaper was reporting a judicial proceeding. Likewise, in Westerhouse v. DeWitt, 215 Mich. 295, we approved an instruction defining the occasion as a meeting of the elders of a church, called to consider, investigate and adjust the differences between its members. *The term 'occasion' then refers to time, place and people.* Was it a testimonial dinner or a gathering in a saloon? Was it a trial at law, legislative debate, or a brawl in the alley? At this point we are looking at the *stage*, not the *script*. * * *
>
> "In making the determination as to the privilege of the occasion, *the malice charged by plaintiff is not considered.* He held in Westerhouse that the question of privilege is to be determined by the occasion and not the language used. In Garn v. Lockhard, 108 Mich. 196, quoting an earlier case, we held similarly that the occasion determines the question of privilege.

> The language is only proper to be considered in connection with the question of malice."

* * * * *

What was the occasion and what were the circumstances? Notably, it is a matter of common knowledge which this Court can with propriety take judicial notice, but also heard undisputed testimony that the occasion involved was a political controversy over the control of the Republican Party in Wayne County in a gubernatorial election year of their respective positions in the Fourteenth Congressional Districts and other areas in Wayne County. As noted by Mr. Justice Adams of the Michigan Supreme Court, in VanDeusen v. Elliott, Romney, et al.,

> "All that appears to have been established was that Mr. Bagwell and others participated in a series of meetings among political leaders whose purpose was to find new leadership and there is nothing illegal about that."

Pleadings, brief and affidavits (hereinafter referred to) bear out that there was organized concern with respect to the demeanor and/or the philosophies, political and otherwise, of some members of the Republican Party.

The pleadings and the record further establish that Senator John H. Stahlin, then a candidate on the Republican ticket for lieutenant governor, requested the chairman of the Michigan Fair Campaign Practices Commission to conduct a full-scale investigation into the activities of certain extremist groups in connection with the forthcoming Republican primary election in Wayne County. Senator Stahlin then transmitted to the commission "Enclosure A".

In "Exhibit A", he made allegations that charged certain Republican Party actives with improper practices, and concluded with the following summary,

> "I have assumed the responsibility of bringing this matter to the attention of the Fair Campaign Practices Commission for two reasons:

(1) I am a member of the Republican Party an this movement poses a great threat to the integrit of the Republican Party;

(2) I am a candidate for state office and the succes of this movement would seriously endanger the Re publican Party's prospect in the 1962 election. I addition, as an American citizen, I am outraged b such an anti-American conspiracy. I submit thes disclosures to your Commission in complete confidenc that you will take all necessary and proper actions i protecting the public interest. (Signed), Respectfully John H. Stahlin."

It is not disputed that "Exhibit A" and the accompanying letter were delivered not only to all members of the Michigan Fair Campaign Practices Commission, but also delivered for publication to the Defendant Detroit News, the editor of which is defendant, Martin Hayden.

It is to be noted that the Fair Election Practices Commission was first developed in 1952. Its membership is appointed by the governor and its purposes generally were to air, discuss and explore what might be termed unethical election practices. It holds hearings, discusses the complaints with the various candidates, and indeed, seeks to obtain pledges from candidates that they will subscribe to the highest norms of political campaigning. It can cover a wide and almost limitless range of political activity. By its own words, it selected to give major emphasis to instances of racial and religious bigotry and to such obvious violations of decency in campaigning as were "too flagrant to be ignored."

The alleged "Exhibit A", admittedly was publicized by Defendant News on May 13, 1962. It is elementary, in the opinion of this Court, that when the publication was delivered to the Detroit News, it could have chosen to publish same or disregard it. It is likewise recognized that all news media assume a responsibility, particularly in campaign years, to disclose all pertinent facts relative to the doings of political candidates, partisan and non-partisan. News media has, what this Court chooses to term, a quasi-public responsibility to make such disclosures in the inter-

est of proper dissemination of all of the facts as they relate not only to actual candidates whose names will appear on the ballot, but the person who either support such candidates or those who may direct or control the party machinery, in a partisan election.

It is a generally known fact, too, that news media, in the assumption of their public responsibility, publicize all matters called to their attention and believed by them to be important enough to disclose to the public. Indeed, news media, from time to time, adopt editorial policies and views on political issues which may be accepted or repudiated by the public. Nevertheless, it is the prime object and responsibility of these media to publish matters of public concern and interest. While some may differ, and critically take issue with the editorial policy or philosophy of any given newspaper, it is well within its quasi-public province to disseminate such information, facts, news items or editorials, in keeping with the best traditions of American free speech and free press. These notions are not new. They find their roots in our constitutional concepts of free press and free speech.

As indicated supra, since the commencement of these actions, a series of cases throughout the country following New York Times v. Sullivan, have transformed many principles of the law of libel and slander. In the New York Times case, the following principles were clearly declared:

> "(1) The ancient doctrine that the constitution does not protect libelous publications may no longer be utilized where its application would serve to impose sanctions upon criticism of the official conduct of public officers;
>
> (2) Expressions of grievance and protest on a public issue do not lose their constitutional protection by reason of a combination of falsity of factual statement and of defamatory content;
>
> (3) Public officials, like judges, are expected to be men of fortitude, unassailed by half-truths, misinformation, charges of gross incompetence, disregard of public interest, Communist sympathy, hints of

bribery, embezzlement and the like, *especially when such charges are hurled in the heat of a political campaign;*

(4) In cases involving criticism of public officials, a new principle of qualified privilege in the law of libel is to be applied, namely, 'the constitutional guarantees require, we think, a Federal Rule that prohibits a public official from recovering damages for defamatory falsehoods relating to his official conduct unless he proves that the statement was made with actual malice — that is with knowledge that it was false or with utter or with reckless disregard of whether it was false or not';

(5) This new principle is to be tested by the facts of each particular case in order to ascertain whether the alleged libelous statements were prompted by actual malice;

(6) On weighing the evidence, the Court is to avoid such result as might suggest that prosecutions for libel on government have any place in the American system of jurisprudence.

(7) The Court is likewise to avoid the thwarting of the free expression of impersonal attack on government by investing the remarks with a personal significance."

Thus, because of the occasion and the pronouncement of New York Times v. Sullivan, Lawrence v. Fox and similar holdings throughout the country, this Court concludes as a matter of law that the publication by defendants News and Martin Hayden was privileged.

The next question presented to this Court is whether or not the qualified privilege has been abused. The qualified privilege raises a presumption which like all presumption in the law may be rebutted. It may be removed by abuse of the privilege of bad faith, actual malice or excessive publication.

In the case of public officials, actual malice must be alleged and proven. Malice in fact means ill will against a person and implies a desire and intention to injure. Thus, a

publisher may not be held liable for statements he honestly believes to be true and published in good faith (see Mundy v. Hoard, 216 Mich. 478; Fortney v. Steffen, 237 Mich. 603; Smith v. Smith, 73 Mich. 445; Buffalino v. Maxon, 368 Mich. 152). This definition has been modified by Times v. Sullivan and other recent decisions.

Plaintiffs' pleadings do not allege excessive publication, nor do they allege bad faith. The pleadings do, however, allege malice, ill will and an intent to injure. Thus, the query immediately arises in the light of recent opinions and decisions, the circumstances of the alleged publication, do plaintiffs' complaint allege a cause of action against defendants News or Martin Hayden?

The Michigan Court, in Robbins v. Evening News Association, 373 Mich. 589, held that a wide latitude is given to a writer or speaker in expressing opinions in regard to one who becomes a candidate for public office. This rule has been recognized in Michigan for many years. This same latitude was expressed by the Michigan Court in Smurthwaite v. News Publicating Company, 134 Mich. 377, wherein the Court said as follows:

> "These publications were discussions of the matters involved in the election and of the fitness of the candidates for the offices for which they sought election. A good deal of latitude must be allowed to newspapers and individuals in discussions of this character."

More significant and telling are pronouncements of Times v. Sullivan (1964, 376 U.S. 254):

> "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, and opportunity essential to the security of the republic is a fundamental principle of our constitutional system. It is a prize American privilege to speak one's mind,

although not always with perfect good taste on all public institutions.

"Thus, we consider this case gainst the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.

"In the realm of religious faith and in that of political belief, sharp differences arise. In both fields, *the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been or are prominent in church or state and even to false statements.* But the people of this nation have ordained, in the light of history that in spite of the probability of *excesses and abuses*, there liberties are in the long view essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

"That erroneous statement is inevitable and in free debate and that it must be protected if the freedom of expressions are to have the breathing space that they need to survive, NAACP v. Button, 371 U.S. 415, was also recognized by the Court of Appeals for the District of Columbia in Sweeney v. Patterson, 76 APP. D.C. 23; 128 Fed. 2d 457."

In that last mentioned opinion, Judge Edgerton spoke for unanimous Court which affirmed dismissal of a Congressman's libel suit based upon a newspaper article charging him with anti-Semitism in opposing a judicial appointment. Said the learned judge, "Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize the governors. The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public re-

quires not merely discussion but information. Political conduct and views which some *respectable people approve and others condemn are constantly imputed to congressmen. Errors of fact, particularly in regard to a man's mental state and processes are inevitable. Whatever is added to the field of libel is taken from the field of free debate.*"

"Injury to official reputation", said the Supreme Court in Sullivan, "affords no more warrant for repressing speech that would otherwise be free than does factual error, even though the utterance contains half-truths and misinformation (Pennykamp v. Florida, 328 U.S. 321). "Criminal contempt of criticism of a judge or his decision, for instance, is not justified":

Equally strong and clear is the following language in Times v. Sullivan:

> "*A rule compelling the critic of official conduct to guarantee the truth of all its factual assertions* and to do so on pain of libel judgments virtually unlimited in amount, leads to a comparable self-censorship. Allowance of the defense of truth, with a burden of proving it on defendant, does not mean that only false speech will be deterred.
>
> "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true because of doubt whether it can be proved in court for fear of the expense of having to do so * * * *. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments."

With the foregoing pronouncements in mind, it is necessary to examine pleadings and affidavits to ascertain whether or not plaintiffs herein have met the test as announced in Sullivan.

Where the occasion is privileged because of public interest as in the within causes, there can be no cause of action for libel. At least, absent constitutionally clear

proof and allegations that the defendant knew the publication false, or published it in reckless disregard of its truth or falsity.

The majority of the Court in New York Times decision held that where the occasion is privileged by reason of the public interest involved, the constitutional guarantees of freedom of speech and freedom of press preclude any action for libel unless it is clearly established that the publication was made with actual malice — that is with knowledge that it was false, or with reckless disregard of whether it was false or not. The privilege is not lost by reason of falsity of the statements made, damage to the plaintiff's reputation, or both. Hence, this Court must be convinced before the privilege is lost that the Constitutional standard is met, namely, defendants' knowledge of falsity, or reckless disregard of truth or falsity.

It might be noted in passing that three members of the United States Supreme Court in concurring opinions, were of the view that discussion of public officers in public affairs must be absolutely privileged. However, in the absense of such a ruling by a majority of that Court or the Michigan Supreme Court, this Court cannot so hold.

Plaintiffs herein allege that the matter published by the Detroit News was published with knowledge of its falsity, and secondly, that the same was published with ill will and maliciously. Plaintiffs' complaint contends that the publication of the so-called offensive document was done wilfully, deliberately, corruptly and with malice aforethought, with the intent and purpose of injuring plaintiffs. Nowhere in plaintiffs' complaint is there an allegation that the publication by Defendant News was done with reckless disregard of whether it was false or not.

This Court is of the opinion that plaintiffs' complaint does not allege any facts relating to any extrinsic circumstances from which the existence of actual malice is inferrable. The only claim of actual malice is a conclusion without allegation of fact and a general allegation that the writing and its publications were done maliciously is insufficient. (See Nuhen v. Slater, 372 Mich. 654, on page 659.)

Absent allegations of fact that defendants News and/or Martin Hayden knew of the falsity of the document or that it was published with reckless disregard of whether it was false or not, plaintiffs do not state a cause of action consistent with, and as required by the constitutional test announced in Times v. Sullivan. In Nuyen v. Slater, the Supreme Court sustained a granting of a summary judgment, dismissing plaintiff's complaint. As indicated, if the publisher honestly believed the publication to be true, and published it in good faith, he cannot be held libelous for statements so made.

This Court should not permit dishonesty of purpose to be lightly inferred from acts which are as consistent with good faith as with bad faith. As said in Raymond v. Croll, 233 Mich. 268, and reiterated in Nuyen v. Slater, if the circumstances relied on showing malice are as consistent with its non-existence as with its existence, the plaintiff has not overcome the presumption of good faith and there is nothing for the jury.

It was once held in Owen v. Dewey, 107 Mich. 67, that a publisher's reasonable belief in the truth of the publication made, or probable cause for belief in truth, or good faith belief in truth, would not relieve him of responsibility for libel, but this case was obviously overruled in later cases and has not been cited to this point in the last fifty years (see Lawrence v. Fox, 357 Mich. 134).

Thus, the source of the publisher's information becomes important. If the source of the publisher's information is a person or organization of probity and good repute, the jury would have warrant to find that what he honestly believed what he published was the truth and thus, that his qualified privilege was not abused.

On the other hand, if his source were notably mandatious, there might well be warrant to find otherwise. For this reason, evidence bearing upon the source of the publisher's information is not only relevant, but crucial to the question of the protection of the qualified privilege. However, the constitutionally defined test of actual malice laid down in Times does not contemplate that the defendant believed the statements to be true, nor that he had actual knowledge of their truth, nor that he have good faith belief of their truth, but rather proof that the statement was

made with knowledge that it was false or was reckless disregard of whether it was false or not.

The privilege is not lost by a showing that the defendant was merely negligent. It need be emphasized here that the definition of malice, as set forth in the Times case and subsequent opinions, is not keyed to ordinary care, but there must be a reckless disregard for truth.

In Rosenblatt v. Baer, 86 Supreme Court 659, (1966), the Supreme Court re-emphasized the Constitutional limitation on libel actions and at page 676 said as follows:

> "The thrust of New York Times is that when interest in public discussions are particularly strong as they are in that case, the constitution limits the protections afforded by the law of defamation."

In Rosenblatt v. Baer, supra, the Supreme Court cited with approval the New York case of Gilberg v. Goffi, 251 N.Y.S., 2d. 823, affirmed, 260 N. Y. S. 2d 29; 207 N. E. 2d. 620 (1965).

In that case, a summary judgment was granted to a defendant who made a political speech which was distributed earlier to the press for publication, charging that:

> "We read in the papers of the charges that the mayors' law firm was practicing under conditions which show a clear conflict of interest. Yet, neither of them called for an investigation."

The Court held that this did not constitute libel of a partner in the mayors' law firm. The privilege of a citizen to criticize official conduct is part of the evolving body of the law of libel which now recognizes that public officials in the performance of their duties enjoy a concomitant immunity when they speak out on matters of public concern, even if a particular citizen be defamed. The threat of a damage suit should not be permitted to prohibit or curtail the freedom of expression of either the citizen or the public servant, citing New York Times v. Sullivan, 376 U.S.A. 282-283.

Rosenblatt held that the definition of malice to include ill will, evil motive, or intent to injure, is constitutionally in-

sufficient where discussion of public affairs was concerned; a civil remedy in a libel action might be allowed only where there is a showing of actual malice, as defined in N. Y. Times. In this respect, plaintiff's complaint is therefore found wanting, and is equally "insufficient".

Based upon the foregoing citations of authority, this Court is of the opinion that defendant News and its Editor, did not abuse the qualified privilege accorded them. They were reporting on matters of grave public concern. The alleged defamatory document (Exhibit A) had been delivered to the Michigan Fair Election Practices Commission (or was to be delivered shortly thereafter). The publisher, in this instance, was faced with the dilemma discussed in Lawrence v. Fox, namely, "the more serious the charge of wrongdoing by public official, the more urgent the need for its airing — yet, the more serious the charge, the greater the libel. It is in this uneasy and menacing situation that the law provides the publisher a sanctuary of sorts — the defense of privilege. The great underlying principle upon which the doctrine of privileged communication stands is public policy."

This was the dilemma confronting the defendants News and Mr. Hayden. For this Court to close its eyes to the pronouncement of Sullivan, Rosenblatt and other cases, would seriously curtail, inhibit and indeed, prevent debate on public issues, political doings and candidates. Were this Court to hold otherwise, debate, discussion and freedom of expression at all Congressional meetings would be sheared and abridged. Any time a delegate or a congressional chairman chose to speak out either for or against those of his own party or for or against those of the opposition, he would be in constant fear of a libel suit for damages.

The motions for summary judgment of defendant Evening News Association and Martin Hayden, are supported by affidavits, wherein it is stated that these defendants neither acted with actual malice either toward any of the plaintiffs or in any way in connection with the entire matter. Their affidavits establish, as did other news agencies that they received a press release copy of Senator Stahlin's request and complaint from the Senator's press representative. They had no personal belief that any of the state-

ments contained in the requests or complaint were false. They relied upon the Senator's integrity and assurance of his press representatives that the statements could be substantiated. They knew that the Senator was a high public official and a Republican candidate for lieutenant governor. They also knew that the request and complaint were addressed to the chairman and members of a Public Commission whose purpose was the investigation of such complaints. They understood that the original request and complaint would be sent to the Commission the day they received their copy. They did not distribute or publish any copy of the request or complaint. The only action taken by them was to publish, two days later, a news article concerning the request and complaint and Mr. Durant's comments thereon. The News article was published by them because they considered Senator Stahlin's request and complaint matters of broad, genuine and public interest and concern. Their only purpose was to inform the public of such matters. They had no personal animosity or malice toward any of the plaintiffs herein. *The article published by them does not mention any of the plaintiffs herein.*

The affidavit of defendant Martin Hayden is not controverted by that of Charles Ferry. The Ferry affidavit indicates that defendant Stahlin informed Mr. Ferry that he had talked to Martin Hayden, Editor of the News, and was told that if the said Stahlin would make a public attack against Richard Durant, he would have the editorial support of the Detroit News in his campaign for lieutenant governor; that the first test for the News support was the candidate's position on Durant; that such a public attack against Durant would help get rid of Durant in the Fourteenth Congressional District, and therefore, the News would support said Stahlin. This portion of the affidavit, while hearsay, is controverted by the sworn deposition taken earlier from Senator Stahlin wherein he testified that Martin Hayden did not tell him to attack Durant; that he did not mention Durant and that the actual discussion was as to the "mess" in the fourteenth District. Senator Stahlin further testified under oath that publicity was not discussed with Mr. Hayden and that he and Mr. Hayden had no conversation concerning an attack on Durant.

More important however, is that portion of the affidavit commencing at the bottom of page six wherein Mr. Ferry states that he wrote Exhibit A, using material from the following sources: From Paul Bagwell, from Glenn Engle, from Donald DeRosen, from Herman McKinney, from Jack Gibbs, from Norman Stockmeyer, and he finally concludes by saying that he obtained information from nearly every facet of party leadership not heretofore mentioned — general confirmation of most, if not all, items. By "party leadership", Mr. Ferry says, he means a series of continuing conversations with individuals mentioned herein and others who expressed their alarm over the possibility of Richard Durant becoming chairman of Wayne County and supplied or confirmed gossip used in the preparation of "Exhibit A". Thus, the conclusion is inescapable that all of the allegations in "Exhibit A" were obtained from those interested in the welfare, progress and success of the Republican Party.

This Court is of the opinion that upon an analysis of the Hayden affidavit, the Engle affidavit and that of defendant Charles Ferry, the Detroit News, a public newspaper, because of the constitutionally guaranteed freedom of the Press and the necessity that the public be informed on matters affecting the public interest, is legally protected in publishing the complaint as made (Exhibit A). It was not the responsibility of defendants News or Martin Hayden to make a private investigation to ascertain the truth or falsity of the allegations in Exhibit A. On the contrary, they were justified in relying upon the source of the information, that is to say, the letter of Senator Stahlin attached to the exhibit; the fact that it was disseminated to the Michigan Fair Election Practices Commission, and moreover, as now learned from Mr. Ferry, "the informations gathered from reputable leaders of the Republican Party."

Assume for the sake of discussion that defendants News and Martin Hayden were motivated in providing publicity for candidate Stahlin. This has no bearing on the ultimate issue in this cause because motive (ill will), as indicated supra, is not to be considered as a part of the constitutional test outlined in New York Times.

There is nothing before this Court other than the bare allegations, unsupported by fact, in plaintiffs' complaint that defendants News and Hayden published Exhibit A with actual malice. Affidavits supplied by plaintiffs in the form of the Ferry affidavit, would give plaintiffs no comfort. Nowhere therein is there anything from which this Court can even infer that the publication was done with actual knowledge of falsity or with reckless disregard of falsity or truth. Indeed, it may be said unequivocally that inasmuch as the document had been submitted to the Fair Election Practices Commission, it then became public property, and as such, may be the object of full disclosure by the public press.

In short, this Court is of the opinion that defendants News and Martin Hayden had a right to rely upon the information supplied them by Senator Stahlin and submitted to the Fair Election Practices Commission. It was furnished to them in the ordinary course of news dissemination and published routinely by defendants in the ordinary course of their business endeavors — the dissemination of news to the general public.

As said in Walker v. Courrier Journal and Louisville Times Company, 246 Fed. Supp. 231 (1965),

> "Everyone knows that news of any matter of public concern possesses a limited lifetime, for to be news it must be published with promptness and dispatch in order that the public be kept informed as to the actions of 'public men', and their activities in connection with matters of public concern."

Defendants News and Hayden had a right to rely on their source. Their doings were as consistent with good faith as with bad faith.

Controlling in the instant case factwise, procedurally and in legal pronouncement, is Walker v. Courrier, supra. The doctrine of the Times case extends not only to public officials. It has been clearly announced in Times wherein the Court cites with approval, Coleman v. MacLennan, 78 Kan. 711; 98 P. 281:

> "This privilege extends to a great variety of subjects and includes matters of public concern, public candidates, public men and candidates for office."

In Sullivan v. Times, the Court stated,

> "We, hold today, that the constitution delimits a state's power to award damages for libel in actions brought by public officials against critics of their official conduct."

This is such an action. Accordingly, this Court is of the opinion that plaintiffs were public men engaged in matters of public concern. In each and every instance, plaintiffs have alleged in their complaint that they were politically active and that because of such activity, they were damaged by the alleged libelous publication. The plaintiffs identify themselves as individuals actively engaged in political activities. Plaintiffs Arber, Heenan, Lady, Plas and Zimmerman, each specifically state that, "to effectuate his or her responsibility as a citizen, he or she has been and now is active politically".

Plaintiffs Robbins, Bell and Brook allege that they were active in a political arena in the community, Wayne County and throughout the State of Michigan; that they became politically active to effectuate and perpetuate their individual and joint responsibilities as liberal, conscientious, loyal and patriotic citizens. Plaintiff Clink states in his complaint that to effectuate his responsibility as a citizen, he has been, for nearly fifteen years, active politically in his community and in the total city of Detroit, in the County of Wayne and in the entire State of Michigan and nationwide.

True, plaintiffs are not public officials within the commonly accepted meaning of the word. However, they are identified as persons of political prominence. Indeed, some may have been, were, or are precinct delegates, working within their particular districts. As such, a precinct delegate, one acting in the furtherance of party politics, is a public person. As a party worker, as a delegate, as a political kingmaker, he occupies an important position in the political arena. As a delegate, he nominates impor-

tant state offices such as that of the attorney general, Supreme Court judges, secretary of state, and as a precinct delegate, he likewise nominates candidates for president of the United States and vice president. He adopts, writes and formulates party policies, party platforms, not only on the state level, but on the national level. Surely, no one can deny that he is one who is a public man, thus makes himself public property. They should have reasonably foreseen that being a person of political prominence, they would subject themselves to criticism of contemporaries, adversaries and co-workers in the cause of party politics (Walker v. Courrier Journal and Louisville Times Company, Inc., supra). Public men are, as it were, public property, hence the doctrine of New York Times v. Sullivan is applicable to the instant case. The decision of Judge Friendy in Pauling v. Louis Syndicate Company, 335 Fed. 2d, 659, favorably presages the result here. The language of Walker v. Courrier, supra, is applicable.

> "In connection with the last above quoted language, the Supreme Court included a footnote to its opinion (footnote 23), in part as follows: 'We have no occasion here * * * to specify categories of persons who would or would not be included.' "

> "From this language—"

says the Court in Walker,

> "- - - I believe the Supreme Court of the United States has served clear notice that the broad constitutional protection afforded by the First and Fourteenth Amendments will not be limited to public officials only. For to have any meaning, the protections must be extended to other categories of individuals or persons involved in the area of public debate or who have become involved in matters of public concern. If the Supreme Court intended to limit its holdings to public officials only, then why footnote 23? I subscribe that footnote 23 is of vast importance in understanding the intended scope of the Supreme Court's opinion, for it is a departure from the Court's judicial rule of basing its decision

> on the narrowest constitutional grounds and is interpreted by this Court as giving special significance to this broad language adopted in arriving at its decision."

Thus, the conclusion is inescapable that each of the complainants or plaintiffs herein, was a person in his own right of political prominence.

This Court feels somewhat like Judge James F. Gordon who wrote in Walker that he adopted the foregoing position feeling that perhaps he was plowing new ground in legal effect, but this Court, like Judge Gordon, feels with the accompanying conviction that not to do so would make the spirit of the Times opinion which he believed and this Court believes also to be, a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open".

Public debate cannot be uninhibited, robust and wide open if the news media are compelled to stand legally in awe of error in reporting the words and actions of persons of political prominence and influence (not necessarily public officials, but persons in the political and public arena), who are nevertheless voluntarily ejecting themselves into matters of grave public concern, attempting thereby and through use of their leadership and influence to mold public thought and opinion to their own way of thinking. These men, like so many party stalwarts, seek the spotlight of the stage of public prominence, party prominence, political prominence, and in so doing, they must be prepared to accept the errors of the searching beams of the glow thereof, for only in such rays can the public know what role he plays on the stage of public concern. Thus, repetitive as it may be, these plaintiffs must establish that the statements as published were knowingly false or were published with a reckless disregard of their falsity or truth. Quoting Walker,

> "The question of existence of actual malice, from the facts taken as true, is a matter of law to be determined by the Court."

In point are the now famous cases of Dr. Linus C. Pauling, a world famous scientist, winner of the Nobel Prize for chemistry and the Nobel Peace Prize. Dr. Pauling brought an action in New York against the National Review, Inc., for libel, based on two articles, one in the National Review of July 17, 1962, and one in the issue of September 25th, 1962, wherein he was referred to as a collaborator, that is to say, and we quote,

> "Take second, Professor Linus Pauling of the California Institute of Technology, once more acting as a megaphone for Soviet policy, boycotting the world peace conference that the Communists have called for this summer in Moscow, just as year after year since time immemorial he has given his time, his name, his energy, voice and pen to one after another Soviet serving enterprise * * *"

Among other things, these statements precipitated the civil action by Dr. Pauling.

Mr. Justice Silverman of the New York Supreme Court wrote a lengthy opinion dismissing the complaint at the close of the plaintiff's case in the trial of Dr. Pauling v. National Review. The Court has before it this lengthy and scholarly opinion. Justice Silverman quoted at length from the cases cited in this opinion. The opinion was written in April of 1966, a copy of which was obtained by this Court from Mr. Justice Silverman. Pointed portions of the Silverman opinion are thusly stated,

> "It is clear that if any private citizen has, by his conduct, made himself a public figure, engaged voluntarily in public discussion of matters of grave public concern and controversy, by doing so, he also has limited his legal remedies for any claimed libel of his reputation."

He further concluded that in determining the relative importance and protection to be given to the interest in public discussion on the one hand and the safeguarding of individual reputation on the other, the Supreme Court, in New York Times case has shifted the balance sharply in

favor of the freedom of public discussion. (See also the decision in Pauling v. News Syndicate Company, 335 Fed. 2d, 659.)

Note too, that Justice Silverman's opinion discloses a reliance upon the case of Gilberg v. Goffey, (21 A. 2d 517, 1964, affirmed by the New York Supreme Court, 15 N. Y. 2d, 1023, 1965) wherein the New York State Court applied the New York Times doctrine to a law partner of the mayor of the city who sued a rival candidate for mayor for libel when the latter said that the mayor's law firm (of which plaintiff was of course, a partner), was practicing law under conditions which showed a conflict of interest. The Court said that although the plaintiff was not a public official, plaintiff's action is so closely related to criticism of a public official that the Times case is determinative. In that case, summary judgment was granted to the defendant who made a political speech which was distributed earlier to the press for publication. It is of significance too, that the mayor's law partner was not named. The important language of that decision follows:

> "The privilege of a citizen to criticize official conduct is part of the evolving body of the law of libel which now recognizes that public officials, in the performance of their duty, enjoy a concomitant immunity when they speak out on matters of public concern, even if a particular citizen be defamed in the process." (Sheridan v. Crisona, 14 N.Y. 2d 108; 198 N.E. 2d, 359.)
>
> "The threat of a damage suit should not be permitted to inhibit or curtail the freedom of expression of either the citizen or the public servant."

The New York Court in Gilberg emphasized that it was of no avail to plaintiff to claim that he was not a candidate for any public office and that he was outside the political arena. This Court gives emphasis to the fact that in the Gilberg case, the trial court had denied motions for summary judgment. The Appellate Division and the Supreme Court reversed, and held that the defendant

was entitled to a summary judgment. In concluding that the plaintiff in Gilberg was not a candidate, the Court of New York held that it was of no avail to him to claim that he was not a candidate and that he was outside the political arena. The Court stressed the point that the law firm of which he was a member had generated the public issue on which the defendant made comment:

> "In our opinion, having entered the fray, as champion of that law firm, plaintiff made himself as much a party of the local political campaign as did his law partner, the mayor."

This Court concludes, as did Mr. Justice Samuel Rabin, in the Gilberg case, that the defendants News and Martin Hayden, had not only the right and the duty to publish what they did publish, and that these plaintiffs must find solace in the philosophy that men in public life must be men of fortitude "who must endure exposure to the vicissitudes of argument in the public forum, where half-truths, misinformation, and worse, are not uncommon in the furror and in the tempo of a political campaign".

It is imperative to observe that in Gilberg, the name of the plaintiff was not mentioned because in these cases, before this court, not one plaintiff was mentioned by name in the publication of May 13th, 1962.

The Court agrees with defendants, in brief, when they argue that even as a matter of law, had the article libelled the two political groups to which these plaintiffs belonged, such libel was not of and concerning these individual plaintiffs, no attempted innuendo could make it so. (See Lewis v. Soule, 3 Mich. 514; Noral v. First Publication, Inc., 104 P. 2d, 860; Golden North Airways, Inc. v. Tanana Publishing Company, 218 Fed. 2d, 612; Watson v. Detroit Journal Company, 143 Mich. 430; Service Parking Corporation v. Washington Times Company, 92 Fed. 2d, 502.

It may be well in passing, to examine the record of proceedings with respect to defendant Charles A. Ferry, deponent, whose affidavit was filed by plaintiffs April 7th, 1966. On January 25, 1965, almost two years ago, plaintiffs

defaulted defendant Charles A. Ferry and such default continues as of this time.

An affidavit filed by plaintiffs from a defendant now in default, merits some scrutiny and cautious examination. However, as indicated in earlier paragraphs of this opinion, the affidavit gives no comfort to plaintiffs, but on the contrary, establishes two things:

(1) That the communication was a qualified privilege and,

(2) That the defendants herein acted without malice and with the honest belief that the statements contained in the said libelous document were true.

This same affidavit also negates any concept that these defendants caused dissemination or publication of the alleged defamatory document with a reckless disregard for its truth or falsity.

Wherefore, the motions for summary judgment on behalf of the Evening News Association is granted for the reasons hereinabove set forth. Judgments may be entered accordingly.

II

Defendants Bagwell, Stockmeyer and Stahlin all make motions for summary judgment on the grounds that there is no fact issue and that the plaintiffs do not state a cause of action. This Court is informed that no depositions were taken in these cases. Hence, all that there is before the Court to determine whether there is a genuine fact issue are the pleadings of plaintiffs and the affidavits filed in support of the respective defendants' motion and the plaintiffs' affidavit of one Charles Ferry, filed April 6, 1966. Reference to these affidavits will be made in later paragraphs of this opinion.

These defendants urge in brief and oral argument that the complaint filed with the Fair Campaign Practices Commission (Exhibit A), was an absolutely privileged communication. With this contention, this Court does not agree. Generally speaking, absolute privilege is confined to cases in which the public service or the administration

of justice require complete immunity from being called to account for language used. It applies more directly to matters of public concern such as language used in legislative, judicial and executive proceedings and is not intended so much for the protection of those engaged in the service as it is for the promotion of the public welfare (Ginger v. Wayne Circuit Judge, 369 Mich. 680).

In Harper and James, The Law of Tort, Section 5.23, "Proceedings before administrative tribunals exercising quasi-judicial powers and before executive officers also come within the rules pertaining to absolute privilege. The protection is extended to members of the commission or tribunal and to witnesses or complainants before it, and this is especially true if the complainants are persons or corporations subject to regulation by the administrative body in question. (See Smith v. O'Brien, 88 Fed. 2d. 769; Allegana v. New York and Cubain Mail, 279 N. Y. Supp. 319; Staffney v. Standard Oil Company, 71 N. D. 170; 299 N. W. 582.)

The majority of opinions throughout the country hold that a person is not subject to a suit for libel in matters filed in judicial proceedings or before bodies whose duties are quasi-judicial, board or commissions (Krumin v. Bruknes, 259 Ill. 9 App. 503).

Absolute privilege as distinguished from qualified privilege has been extended to many inquiries that are not conducted before Courts of justice or courts of record . . . to proceedings before the Interstate Commerce Commission. (See Independent Life Insurance Company v. Rogers, 165 Tenn. 447.)

The Michigan Fair Election Practices Commission is not such a board, having either administrative authority, quasi-judicial, nor is it in any sense a creature of any statute in this state. It came into being in 1952. Its members are appointed by the governor of the state. It is made up of citizens of prominence and stature. It has no subpoena power. Its findings are not binding upon anyone; while it does make effort to encourage a fair election practice by soliciting voluntary cooperation and voluntary pledges from candidates, it has, to use a trite expression, no teeth, no statutory authority and makes no findings, excepting in the dissemination of information. It

is an attempt to bring together a cooperative modus operandi with respect to elections by candidates of both parties and political leaders. Its members serve as volunteers. They receive no remuneration. Their service is available because of their desire to serve the public with respect to election practices. It is not comparable with Unemployment Compensation Commission, Interstate Commerce Commission, a Liquor Control Board, an Election Commission, or any statutorily created board or administrative reviewing authority. It is unlike the State Health Department which has supervisory control over its employees as noted in Nuyen v. Slater, supra.

Defendants also urge that the complaint filed with the F.E.P.C. (Exhibit A), was protected by a qualified privilege. (See Timmis v. Bennett, 352 Mich. 355; Lawrence v. Fox, 357 Mich. 135, and Buffalino v. Maxon, 368 Mich. 140.)

This Court agrees with the latter contention that the publication in issue in these causes is conditionally or qualifiedly privileged. The essential elements of a conditionally privileged communication may be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. The privilege arises from the necessity of full and unrestricted communication concerning a manner in which the parties have an interest or duty and is not restricted within any narrow limits. (See Buffalino v. Maxon, supra; 33 Am. Jur. Sec. 126, p. 124, 126.)

This Court determines, as a matter of law, that a qualified privilege exists with respect to the alleged communication.

QUERY: What was the occasion? What is it that makes this communication privileged? As stated in Walker v. Courrier, supra, the privilege extends to a great variety of subjects and includes matters of public concern, public men and candidates for office.

Defendant Bagwell was a candidate for governor in 1958 and 1960. Defendant Stahlin was a state senator and candidate for lieutenant governor. Defendant Stockmeyer was the chairman of the Wayne County Republican Com-

mittee. Each of these men rightfully believed and assumed that the success of the Republican Party, its progress, and its stature as a political party, cast on them the duty of making such a communication to other persons in the performance of such duty. As indicated in their affidavits, they believed it was right in the interest of society, their party and the State of Michigan that they should relate to the Fair Practice Election Commission, certain facts which they, by affidavit, contend they did in good faith proceed to do. They, by affidavit, contend, which affidavit is not controverted, in good faith, had an interest, as leaders, molders, directors of the destiny of the Republican Party, and charged with the responsibility of electing the Republican candidates in the present election. They believed, as they contend by affidavit, that this was their duty and their duty was to disclose these facts to the Commission, to other Republicans, to communications media, who had a corresponding interest or duty. This is so even though it may contain matters which without this privilege would be actionable. While their duty was not a legal one, it was their judgment that theirs was a moral, social and political duty of imperfect obligation. (See Buffalino v. Maxon, 368 Mich.; Lawrence v. Fox, 357 Mich. 134; Timmis v. Bennett, 352 Mich. 355)

The occasion was explored and explained, as indicated in Lawrence v. Fox and Durant v. Stahlin, 375 Mich. 628, wherein the Supreme Court of this State indicated that the depositions and pleadings established that there was a long standing political conflict between one Richard Durant and other Republican leaders in the Fourteenth Congressional District. The Court pointed out that there were hundreds of pages of testimony as to political conflicts at the time within the Republican Party. It has been established on the record in this Court, as well as by the Supreme Court, that there was a strong movement to oust the leadership of the Fourteenth Congressional District. There was strong opposition to Mr. Richard Durant and his followers, out of which opposition arose this litigation (including Durant v. Stahlin, 375 Mich. 628).

As stressed in Walker v. Courrier Journal, surpa, the privilege extends to a great variety of subjects and includes

matters of public concern, public men and candidates for office.

The Supreme Court of the United States enforced the rule that the broad constitutional protection afforded by the First and Fourteenth Amendments would not be limited to public officials only, for to have any meaning, the protection must be extended to other categories of individuals or persons involved in the area of public debate, or who have become involved in matters of public concern.

Each and every one of these defendants were engaged in a political arena — were engaged in a political battle. They were waging a hard fight to assure victory for their party status and in keeping with the traditions of the Republican Party as they saw it.

Thus, this Court determines that as a matter of law, a qualified privilege exists with respect to these defendants and the alleged communication. Accordingly, this Court need not labor this opinion with a repetition of authorities and findings in the Detroit News and Martin Hayden opinion. *The same principles are adaptable and applicable to each and every one of these defendants, namely, Messrs. Bagwell, Stockmeyer and Stahlin.*

An examination of each of the affidavits submitted in support of the motions for summary judgment is necessary and opportune. This examination becomes meaningful as it is incumbent upon this Court to ascertain whether there is a genuine fact issue and whether or not plaintiffs have by pleadings, asserted a cause of action. It must be borne in mind, there are no depositions. All there is before this Court are the affidavits of each defendant and the affidavit of defendant Charles Ferry filed by plaintiff.

Defendant Stahlin, under oath, says that in the spring of 1962, he received information from Mr. Charles Ferry, a writer and research assistant employed by him, and Mr. Paul Bagwell and others, concerning activities of certain groups in connection with the Republican Party and a forthcoming Primary Election in Wayne County. He concedes he had no personal knowledge of all this information, but he believed that it was true. He also states that as a State Senator and aware of his responsibilities, as an interested Republican and citizen, he communicated this information with the Michigan Fair Practices Commission.

At the time of such communication, he believed that the information contained in the exhibit was true. Believing it to be a matter of public interest, he thought the public generally should be advised of this information. He asserts that he acted in good faith with a conviction that the information was true. He contends that he had the responsibility and obligation to bring this to their attention. He further unequivocally states that he acted with no ill will or malice towards plaintiffs in this cause.

The Bagwell affidavit contains, in general terms, the following statements, "That in 1958 and 1960, he was a candidate of the Republican Party, and in May, 1962, he was the titular head of the Republican Party in the State of Michigan, and in such capacity, conferred with numerous officials, candidates and would-be candidates for office in government and the Republican Party itself. In May of 1962, he received information from Karl B. McKeehan, a longtime Republican worker, which information and material, Mr. Bagwell turned over to defendants Stahlin and Ferry. (This Karl B. McKeehan was granted summary judgment in each of the cases now before this Court by the Hon. Joseph A. Moynihan, which were affirmed on appeal in Zimmerman v. Stahlin, 374 Mich. 93.)

Mr. Bagwell further says that the document entitled 'Greetings', called for delegates for George Lincoln Rockwell Delegates, Inc. U.S.A., and was an actual bulletin which had been circulated in the area and had been sent from defendant Stockmeyer to defendant Bagwell. The document promised further announcements. Defendant Bagwell further says under oath that he did not know that the allegations set forth in the material turned over by him were false. He further denies any ill will or malice towards anyone."

Defendant Stockmeyer, by affidavit, denies either directly or indirectly, compiling any material for or formulating or preparing or publishing the alleged document attached to plaintiffs' complaint. He denies directly or indirectly agreeing or entering into any understanding or plan to make the alleged document, Exhibit A. He further asserts that he did not discuss its formulation, compilation, preparation, publication or distribution with any other persons named in plaintiff's complaint, prior to the time

of its publication. He denies any knowledge of the existence of the exhibit or that it was being compiled, formulated, prepared, published or distributed prior to its publication in newspapers of the City of Detroit.

It is the opinion of this Court that the Ferry affidavit does not controvert the affidavits filed by defendants Bagwell, Stahlin and Stockmeyer. Mr. Ferry's affidavit admits that the material used in the document that was submitted to the F.C.P.C. was the subject of discussion among the highest ranking members of the Republican Party prior to the preparation of the exhibit. He says he discussed the subject with at least the following persons: Elly Peterson, Norman Stockmeyer, Jack Gibbs, Donald DeRosen, Richard VanDeusen, Herman McKinney, Paul Bagwell, Glenn Engle and Stanley Thayer, all of whom, with the possible exception of Thayer, confirmed the accuracy of the information. He further swears that both he and Stahlin believed the information given them by Mr. Bagwell. He further, in general terms, indicates that many others high in the Republican Party, were gathering information on the same subject. He says in clear terms that he received information from nearly every facet of party leadership not heretofore mentioned, and general confirmation of most, if not all, of the items set forth in Exhibit A.

In his affidavit, Mr. Ferry also indicates that the using of the complaint with the Fair Campaign Practices Commission was approved of by persons high in the party, Mr. Gibbs, Mrs. Peterson, Mr. Bagwell and Norman Stockmeyer. The affidavit further indicates and confirms that there was a fight between some of the Republicans, and an attempt to oust Richard Durant from leadership in the Fourteenth Congressional District.

Significantly, he says "that he and defendant Stahlin believed the information given them by Paul Bagwell and Paul Bagwell told him that his group would continue to investigate Durant and would come out with a further attack of their own subsequent to the publication of Exhibit A." He further admits that Bagwell, in his meetings and in his conversation, was acting as a spokesman for the Republican Action Committee.

In reviewing the affidavit of deponent Ferry, this Court is constrained to conclude that from its four corners, while

it contains hearsay and matters conclusionary in nature, the factual statements therein contained negates any concept of malice as defined in Times v. Sullivan. On the contrary, the affidavit establishes rather conclusively in the view of this Court, that these defendants did not know that the contents of the exhibit were false, nor did they conduct themselves in utter and reckless disregard of the truth or falsity of the contents of the document.

It may also be said that nowhere in the affidavit can a fair inference be drawn that these defendants knew that the contents of the document were false or that the complaint as filed was false, or that they acted in a reckless disregard of its truth or falsity. On the contrary, the affidavit, from its four corners, lends strong support to the findings of this Court as heretofore discussed in the News-Hayden cases, and strengthens the judgment herein made that the document was a qualifiedly privileged one.

Even though it may be argued that there was ill will, evil motive, intent to injure on the part of these defendants in their attempts to oust Richard Durant, it has been held that a definition of malice to include ill will, evil motive, intent to injure, is "constitutionally insufficient where discussion of public affairs is concerned". A civil remedy in a libel action might be allowed only where there is a showing of actual malice as defined in New York Times. (See Rosenblatt, supra, and Garrison v. Louisiana, 379 U. S. 64; Times v. Sullivan.)

This Court is of the opinion, therefore, that there is no genuine fact issue and/or that plaintiffs do not assert or allege a cause of action against the defendants herein named. Motions for summary judgments are granted. Orders may be entered accordingly.

/s/ Joseph G. Rashid
Circuit Judge.

ORDER FOR SUMMARY JUDGMENT FOR DEFENDANT PAUL D. BAGWELL

(Circuit Court — County of Wayne)

(Arber v. Stahlin)

(Civil Action No. 6431)

(Filed Jan. 13, 1967)

At a session of said Court held at the City-County Building, Detroit, Wayne County, Michigan, this 13th day of January, 1967.

Present: Honorable Joseph G. Rashid, Circuit Judge.

Upon reading and filing defendant Paul D. Bagwell's Motion For Summary Judgment, and the Court having heard arguments of counsel in open court, and having received briefs from the parties and taken the matter under advisement, and having entered its written opinion, upon motion of Dykema, Wheat, Spencer, Goodnow & Trigg,

IT IS ORDERED, that the Motion For Summary Judgment of defendant Paul D. Bagwell be, and the same hereby is, granted and that plaintiff recover nothing from said defendant.

/s/ Joseph G. Rashid,
Circuit Judge

SUMMARY JUDGMENT FOR DEFENDANT JOHN H. STAHLIN

(Circuit Court — County of Wayne)

(Arber v. Stahlin)

(Civil Action No. 6429)

(Filed Jan. 13, 1967)

At a session of said Court held at the City-County Building, in the City of Detroit, Wayne County, Michigan, held Jan. 13, 1967.

Present: Honorable Joseph G. Rashid, Circuit Judge.

The Motion for Summary Judgment of Defendant John H. Stahlin having duly come on to be heard, the parties having filed written briefs, the arguments of counsel for the parties having been heard by the Court, and the Court being fully advised in the premises and having filed its written opinion that such Motion for Summary Judgment should be granted,

IT IS HEREBY ORDERED, that the Motion for Summary Judgment of Defendant John H. Stahlin be, and the same is, granted, that judgment for said Defendant be entered and that Plaintiff recover nothing from said Defendant.

/s/ Joseph G. Rashid,
Circuit Judge

APPENDIX B

OPINION AND ORDER OF THE MICHIGAN COURT OF APPEALS

PATRICIA ARBER,
Plaintiff-Appellant,
-v-
JOHN H. STAHLIN, et al.,
Defendants-Appellees.
No. 3397

ALLAN B. CLINK,
Plaintiff-Appellant,
-v-
JOHN H. STAHLIN, et al.,
Defendants-Appellees.
No. 3398

GERALD A. PLAS,
Plaintiff-Appellant,
-v-
JOHN H. STAHLIN, et al.,
Defendants-Appellees.
No. 3399

PALMER T. HEENAN,
Plaintiff-Appellant,
-v-
JOHN H. STAHLIN, et al.,
Defendants-Appellees.
No. 3400

KARL LADY,
Plaintiff-Appellant,
-v-
JOHN H. STAHLIN, et al.,
Defendants-Appellees.
No. 3401

GEORGE M. ZIMMERMAN,
Plaintiff-Appellant,
-v-
JOHN H. STAHLIN, et al.,
Defendants-Appellees.
No. 3402

Before: Lesinski, C.J., J. H. Gillis and T. G. Kavanagh, JJ.

T. J. Kavanagh, J.

This matter involves six libel actions which arose out of a political conflict between, on the one hand, supporters of one Richard Durant (plaintiffs herein) and, on the other, leaders of the Republican Party in Michigan, who allegedly were attempting to oust Durant from a position of influence within the party. The alleged libel was contained in a letter, with an attached enclosure, which defendant Stahlin sent to the Michigan Fair Campaign Practices Commission, charging plaintiffs with improper political activities. In their complaints plaintiffs allege that the defendants participated in the preparation and publication of the allegedly libelous document, that the charges contained in the document were false, and that defendants knew that they were false and maliciously caused it to be published for the purpose of damaging the reputation of plaintiffs. Each defendant filed an answer to the complaint and a motion for a summary judgment with an affidavit in support of the motion, pursuant to GCR 1963, 117. Each motion asserted that the proponent was entitled to judgment as a matter of law because there was no genuine issue as to any material fact. GCR 1963, 117.2(3). After hearing argument by counsel on the motions, the Circuit Court granted the motions of each defendant, and filed his written opinion. Plaintiffs have appealed.

We deal first with the granting of the motion for summary judgment as to defendants Martin S. Hayden and Evening News Association. In addition to sending a copy of the enclosure to each of the members of the Fair Campaign Practices Commission defendant Stahlin delivered a copy to the above two defendants who allegedly caused to be published in the Detroit News a news story relating some of the contents of the enclosure. The news story, a copy of which has been made part of the record on appeal, makes no reference to any of the plaintiffs. It does, however, refer to some political organizations, e.g. the John Birch Society and Young Americans for Freedom, *inter alia*, to which plaintiffs claim to belong. Plaintiffs contend

that the charges made against these organizations were generally understood to have been made against the members thereof, including plaintiffs, thus giving plaintiffs a right to recover. This contention was considered and rejected by this Court in *Chapman v. Romney* (1967), 6 Mich. App. 36. Accordingly, we hold that summary judgment was properly granted in favor of defendants Hayden and Evening News.

As to all defendants the Circuit Court determined that there was a qualified privilege under the holdings in *New York Times Co. v. Sullivan* (1964), 376 U.S. 254 (84 S. Ct. 710, 11 L ed 2 686) and *Associated Press v. Walker* (1967), 388 U.S. 130 (87 S. Ct. 1975, 18 L ed 2d 1094) and that plaintiffs could not recover in the absence of actual malice, defined as knowledge of the falsity of the statements made, or reckless disregard of their truth or falsity. The correctness of this determination depends upon whether plaintiffs are "public figures" under the decision in the *Walker* case. Mr. Chief Justice Warren, writing in *Walker,* said:

> "To me, differentiation between 'public figures' and 'public officials', and adoption of separate standards of proof for each has no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinction between governmental and private sectors are blurred. * * * This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.
>
> "Viewed in this context then, it is plain that although they are not subject to the restraints of the political process, 'public figures', like 'public officials', often play an influential role in ordering society. And surely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in

> the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.' The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct." 18 L. ed. 2d, p. 1116.

In holding that plaintiffs herein are "public figures" we adopt the reasoning of the Circuit Court below:

> "True, plaintiffs are not public officials within the commonly accepted meaning of the word. However, they are identified as persons of political prominence. Indeed, some may have been, were, or are precinct delegates, working within their particular districts. As such, a precinct delegate, one acting in the furtherance of party politics, is a public person. As a party worker, as a delegate, as a political kingmaker, he occupies an important position in the political arena."

Since the defendants herein were qualifiedly privileged, the crucial question is whether they acted with actual malice, as defined by the *New York Times* and *Walker* cases, supra. The motions for summary judgment were properly granted *only* if there is no genuine factual issue as to the question of actual malice.

By their motions defendants challenged plaintiffs' ability to prove their allegations. When the motion asserts the absence of a genuine issue of material fact under GCR 1963, 117.2(3) and is supported by affidavit or other proof, the opposing party must submit affidavits or other proof of his own to establish that a genuine issue of material fact does exist. *Durant v. Stahlin* (1965), 375 Mich. 628; *Christy v. Detroit Edison Company* (1966), 2 Mich. App. 730.

Except for the affidavit of defendant Stockmeyer, the affidavits submitted in support of the motions contained

sworn assertions that the defendants acted in good faith and without knowledge of any falsity in the contents of the enclosure. In opposition to the motions plaintiffs submitted the affidavit of one Charles Ferry, who had originally been a defendant in this matter and against whom a default judgment had been taken. There is nothing in Ferry's affidavit to contravert defendants' assertions of good faith and lack of knowledge. In fact, to the extent that it deals with the question of malice at all, the Ferry affidavit tends to corroborate defendants' position.

The Stockmeyer affidavit consists of sworn statements that he did not participate in the preparation or publication of the enclosure. The Ferry affidavit, in opposition to Stockmeyer's motion for summary judgment, asserts that the affiant discussed the publication of the enclosure with Stockmeyer and received information from him to be used in the exhibit. Since neither the Stockmeyer nor the Ferry affidavits deal with the question of malice as it relates to Stockmeyer, the disposition of his motion for summary judgment turns upon the pleadings. On the one hand, the complaint alleges that the defendants knew of the falseness of the charges in the enclosure, and, on the other, defendant Stockmeyer's answer denies any such knowledge. Viewing the pleadings and affidavits in the light most favorable to the plaintiffs, as we must for the purpose of these motions, we conclude that plaintiffs have raised genuine issues of material fact as to defendant Stockmeyer and accordingly the judgment of the Circuit Court granting his motion for summary judgment is set aside. The granting of the motions of the other defendants is affirmed for the reason that plaintiffs have failed to raise a genuine issue of fact as to the element of malice.

APPENDIX C

OPINION AND ORDER OF THE SUPREME COURT OF MICHIGAN

PATRICIA ARBER,
Plaintiff-Appellant,
-v-
JOHN H. STAHLIN, et al.,
Defendants-Appellees.
No. 52,051

ALLAN B. CLINK,
Plaintiff-Appellant,
-v-
JOHN H. STAHLIN, et al.,
Defendants-Appellees.
No. 52,052

GERALD A. PLAS,
Plaintiff-Appellant,
-v-
JOHN H. STAHLIN, et al.,
Defendants-Appellees.
No. 52,053

PALMER T. HEENAN,
Plaintiff-Appellant,
-v-
JOHN H. STAHLIN, et al.,
Defendants-Appellees.
No. 52,054

KARL LADY,
Plaintiff-Appellant,
-v-
JOHN H. STAHLIN, et al.,
Defendants-Appellees.
No. 52,055

GEORGE M. ZIMMERMAN,
Plaintiff-Appellant,
-v-
JOHN H. STAHLIN, et al.,
Defendants-Appellees.
No. 52,056

Appeal from Court of Appeals, Division 1, Lesinski, C.J., and J. H. Gillis and T. G. Kavanagh, JJ., affirming Wayne, Rashid (Joseph G.) J. Submitted April 9, 1969. (Calendar No. 3, Docket Nos. 52,051-52,056.) Decided September 3, 1969.

10 Mich App 181, reversed.

Complaints by Patricia Arber, Allan B. Clink, Gerald A. Plas, Palmer T. Heenan, Karl Lady, and George M. Zimmerman against John H. Stahlin, Paul D. Bagwell, Martin S. Hayden, Evening News Association, and others for damages arising from the alleged publication of a libelous document. Summary Judgments for the above-named defendants. Plaintiffs appeal to Court of Appeals. Affirmed as to the above-named defendants. Plaintiffs appeal. Reversed and remanded for further proceedings.

Davidow & Davidow, for plaintiffs.

Warner, Norcross & Judd (*Lewis A. Engman* and *Jerome M. Smith, of counsel*), for defendant Stahlin.

Dykema, Wheat, Spencer, Goodnow & Trigg (*Donald E. Shely*, of counsel), for defendant Bagwell.

Butzel, Eaman, Long, Gust & Kennedy (*George E. Brand, Jr.*, of counsel), for defendants Evening News Association and Hayden.

T. M. KAVANAGH, J. This appeal is from orders of the circuit court granting motions for summary judgments as to defendants, The Evening News Association, Martin S. Hayden, Paul D. Bagwell, and John H. Stahlin. The motions arose in six cases which were consolidated by order of the Court of Appeals. The summary judgments were affirmed by that Court.

The original complaints in the six cases before us were filed in May, 1963. They arose out of a conflict between the plaintiffs, who were supporters of one Richard Durant, and certain leaders of the Republican party in Michigan, who allegedly were attempting to oust Durant from a position

of influence within the party. The alleged libel was contained in a letter dated May 10, 1962, with an enclosure, mailed by then State Senator John H. Stahlin to the Michigan fair campaign practices commission, charging plaintiffs with improper activities.

Plaintiffs charge that the above-circulated documents were libelous in that the statements made, and the natural inferences to be drawn therefrom, charged the plaintiffs with being members of and/or associated with groups and/or persons whose activties were detailed as consisting of bribery, diversion of party funds, intimidation, misrepresentation, threats of physical violence, anti-Semitism, anti-Negro sentiments, violation of the American tradition of honesty, decency, and fair play, and Fascist, immoral and reprehensible conduct.

Defendants filed their several motions for summary judgments.

The motions of defendants The Evening News Association and Martin S. Hayden were based upon: (1) Claimed privilege in the matter of "transmission of Senator Stahlin's letter and enclosure of May 10, 1962, to the chairman of the fair campaign practices committee, with copies to the members of said committee and to the press." (2) The publication by The Evening News Association of May 13, 1962, was privileged as a matter of law under the First and Fourteenth Amendments to the United States Constitution, and under Michigan Const 1963, art 1, §§ 3 and 5,[1] as being a matter of broad and general public interest. (3) The article did not name the plaintiffs and did not concern or libel plaintiffs as a matter of law. (4) There was no genuine issue as to any material fact and the undisputed facts show that defendants The Evening News Association and Martin S. Hayden did not act with actual malice toward plaintiffs. Attached to the motions were the affidavits of Frederick G. Engle, political writer for The Detroit News, and Martin S. Hayden, editor of The Detroit News. These affidavits, together, with other affi-

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1 Since the acts complained of occurred in May, 1962, Const 1908, art 2, §§ 2 and 4, were applicable.

davits hereafter mentioned, are contained in the appendix to this opinion.

The motions for summary judgments, with supporting affidavits, filed by defendants John H. Stahlin and Paul D. Bagwell, relied upon GCR 1963, 117.2(3), alleging that there was no genuine issue as to any material fact in the action because the publication of the statements complained of was privileged and such statements were not libelous of the plaintiffs.

In answer to the several motions for summary judgments, plaintiffs filed the affidavit of defendant Charles Ferry.

The motions for summary judgments were granted and orders were entered in the various cases on behalf of each of the defendants.

Plaintiffs appealed to the Court of Appeals. The Court of Appeals affirmed the grant of summary judgments "for the reason that plaintiffs have failed to raise a genuine issue of fact as to the element of malice." 10 Mich App 181, 188.

Plaintiffs are here on leave granted. 381 Mich 767.

This Court is requested — principally upon the authority of *New York Times Co. v. Sullivan* (1964), 376 US 254 (84 S Ct 710, 11 L Ed 2d 686, 95 ALR2d 1412) — to draw the fine line between speech unconditionally guaranteed and speech which may legitimately be regulated (see *Speiser v. Randall* (1958), 357 US 513, 525 [78 S Ct 1332, 2 L Ed 2d 1460]). This we cannot do.

The sole issue before this Court is whether summary judgments were properly or improperly granted. We hold that summary judgments were improperly granted.

While we agree with the lower courts that the *New York Times* standard relating to "public officials"[2] and its sub-

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2 *New York Times Co. v. Sullivan* (1964), 376 US 254 (84 S Ct 710, 11 L Ed 2d 686, 95 ALR2d 1412). The *New York Times* standard imposing constitutional limitations upon libel actions brought under State law is as follows (pp 279, 280):

"The constitutional guarantees require, we think, a Federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

sequent extension to "public persons,"[3] is controlling if plaintiffs are in fact "public persons,"[4] we cannot agree with the conclusion that there is no question of fact as to " 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." See *New York Times, supra,* p 280.

Let us examine the facts presently before us. The affidavits of defendants Engle and Hayden state that their sole participation in the alleged libel was the publication of defendant Stahlin's request and complaint to the fair campaign practices commission and Mr. Durant's comments thereon. The affidavits of all defendants aver that the publication was without actual malice, but all tacitly admit knowledge of the content of exhibit "A".

On the other hand, we have the affidavit of defendant Charles Ferry, filed by plaintiffs, alleging that, as campaign manager for Stahlin, he was in close and constant communication with defendant Stahlin; that he knew Stahlin had been promised political support by certain party leaders if Stahlin would publicly attack Durant; and that

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3 *Curtis Publishing Co. v. Butts* (1967), 388 US 130 (87 S Ct 1975, 18 L Ed 2d 1094), and its companion case, *Associated Press v. Walker* (1967), 388 US 130 (87 S Ct 1975, 18 L Ed 2d 1094). By a 5-to-4 vote the United States Supreme Court adhered "to the *New York Times* standard in the case of 'public figures' as well as 'public officials.' " See the concurring opinion of Mr. Chief Justice Warren, 388 US 162, 164, joined in by Justices Brennan, White, Black, and Douglas as to parts I and II.

4 While not dispositionally relevant to the case before us, we note that the term "public figure" has been defined as a person who by his accomplishments, fame or mode of living, or by adopting a calling which gives the public a legitimate interest in his activities affairs and character, has become a "public personage," *i.e.*, a celebrity. See Prosser, Torts (3d ed, 1964), § 112, pp 844, 845; see, also, *Cason v. Baskin* (1947), 159 Fla 31 (30 So 2d 635); *Grayson v. Curtis Publishing Co.* (1967), 72 Wash 2d 999 (436 P2d 756); *Dietemann v. Time, Inc.* (CD Cal), 284 F Supp 925; *News-Journal Company v. Gallagher* (1967), — Del — (233 A2d 166). Of course, the public figure stature must exist prior to the alleged libel and not by virtue of the notoriety created by it.

Nothing in the record indicates that plaintiffs were in fact "public figures." In fact, defendant Hayden, who was the editor of the newspaper that published the alleged libel, and who was certainly in the best position to know the identities of "public persons" in the community, deposed that he "was not acquainted with plaintiff herein." We cannot agree with the circuit judge's facile reasoning that "some [of the plaintiff] may have been, were, or are precinct delegates" and thus "a public person." This reasoning is unsupported by the proofs necessary to make such a finding of fact and is, at best, a conclusionary observation.

The Detroit News, through Martin S. Hayden, would editorially support Stahlin in his campaign for lieutenant governer if he would publicly attack Durant.

Deponent Ferry further stated that—with this *quid pro quo* arrangement in mind to obtain the support of The Detroit News and the other defendants—he and Stahlin began gathering potentially damaging information and arranged to give defendant Engle of the News the "beat" on the story because it was the only paper which was really after the "Durant thing."

Ferry's affidavit gives in detail the time and the information received in the subsequent meetings. Deponent tells of the enthusiastic support of defendant Bagwell in planning and executing the attack on Durant and the discussions with The Detroit News' representatives, including Engle, Robert Poppa, Carl Rudow, and Will Muller.

The end product of these meetings and political fact-gathering efforts with defendants and others was exhibit "A". The exhibit was presented to The Detroit News through Mr. Engle and Mr. Hayden on May 11, 1962, prior to publication. Accordingly to deponent Ferry, Mr. Hayden released him at that time from giving the News the "beat," because he wanted it to have the greatest circulation possible. The exhibit was then mimeographed and distributed to other news media and was published in The Detroit News on Sunday, May 13, 1962, prior to the mailing of exhibit "A" to the fair campaign practices commission.

The record indicates that defendants had complete control over releasing the news and that they could have released it at any time. We observe, however, that it was not "hot news" requiring immediate dissemination as in *Associated Press v. Walker* (1967), 388 US 130, 157 (87 S Ct 1975, 18 L Ed 2d 1094), but rather the type of news which by its very nature requires close scrutiny and careful verification (see *Curtis Publishing Co. v. Butts* (1967), 388 US 130 (87 S Ct 1975, 18 L Ed 2d 1094).

Viewing all of the conflicting representations in the affidavits, could not a jury find or reasonably infer that

defendants intended solely to "get Durant" and that they were not in the least concerned with plaintiffs, who were virtual anonymities in the political area, or with the true facts regarding their participation in the Durant campaign? Could not a jury also find or reasonably infer that the hurried publication of the allegedly libelous document was indicative of a reckless disregard of whether it was true or not?

From these and other facts disclosed by the record, we find that reasonable minds could find or reasonably infer that the document was prepared and published with an intent to cause harm through falsehood or in reckless disregard of the truth or falsity of the allegations. See *Rose v. Koch* (1967), 278 Minn 235 (154 NW 2d 409). This creates a typical jury question.[5]

Where actual malice, in the sense that an alleged defamer knew the statement to be false or acted in reckless disregard of its truth or falsity, is alleged in any of the pleadings, the crucial and often determinative factor is credibility. As we have repeatedly emphasized, summary judgment is not available whenever a presented issue of material fact turns upon the credibility of an affiant or witness whose deposition has been taken. *Durant v. Stahlin* (*Appeal in re Van Dusen, Elliott, Romney*) (1965), 375 Mich 628, and cases cited therein.

It is simply not legally sufficient to say that since plaintiffs did not prove by their affidavits a publication with knowledge of falsity or reckless disregard of truth or falsity, the fact of actual malice did not exist. The determination of actual malice depends on more than a mere

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5 We note with great interest that it is more than mere coincidence that the Federal authorities have consistently, under both the *New York Times Co. v. Sullivan* and *Curtis Publishing Co. v. Butts* standards, refused to grant summary judgment [see, *e.g.*, *Goldwater v. Ginzburg* (SD NY, 1966), 261 F Supp 784; *Walker v. Courrier-Journal and Louisville Times Company, Inc.* (CA 6, 1966), 368 F2d 189)], or reviewed the case only after a full trial was held (see, *e.g.*, *New York Times Co. v. Sullivan, supra; Rosenblatt v. Baer* (1966), 383 US 75 (86 S Ct 669, 15 L Ed 2d 597;*Curtis Publishing Co. v. Butts*, supra.

denial; it must be resolved from a study of the witness on the stand, his interest or lack of interest in the case, his rule in the publication of the alleged libel, and the many other factors making up the issue of credibility.

We hold that where, as here, the credibility of a witness or deponent is crucial, summary judgment should not be granted.

The judgments of the Court of Appeals and the circuit court are reversed and the causes remanded for further proceedings.

Plaintiffs shall have costs of the appellate courts.

T. E. BRENNAN, C. J., and DETHMERS, BLACK, and ADAMS, J.J., concurred.

KELLY and T. G. KAVANAGH, JJ., did not sit.

APPENDIX

"I, Frederick G. Engle, being duly sworn, depose and say:

"1. I have personal knowledge of the facts herein stated and I am prepared if sworn as a witness to testify fully and competently thereto.

"2. I am, and since prior to 1962 have been, a political writer for The Detroit News.

"3. I first saw Senator Stahlin's May 10, 1962 request that the fair campaign practices commission conduct a full-scale investigation into the activities of certain extremists groups in connection with the then forthcoming Republican primary election in Wayne county and the attached complaint (exhibit A to plaintiff's complaint) on Friday, May 11, 1962, when Senator Stahlin's press representative, Charles H. Ferry, delivered a copy thereof to the office of The Detroit News. I understood that there was a Michigan fair campaign practices commission, that Reverend Marshall R. Reed was its chairman, and that the persons shown as receiving copies of Senator Stahlin's request and complaint were the members of the commission. The

commission conducted an investigation in response to the request and complaint.

"4. On May 11, 1962, Mr. Ferry had with him a stamped, sealed envelope addressed to the chairman of the commission which he said contained the original letter and complaint and which he was going to mail immediately. The copy of the letter and complaint which Mr. Ferry delivered to the News was for the use of the News as a public newspaper. I also understood that such copies were being delivered to the Detroit Free Press and to other news agencies. The Detroit Free Press published an article regarding the request and complaint on May 13, 1962. A copy is hereto attached.

"5. On May 11, 1962 I read Senator Stahlin's request and complaint. I knew that Mr. Ferry was Senator Stahlin's press representative. I asked Mr. Ferry if he was able to substantiate the statements made in the complaint and Mr. Ferry said that he could. I also showed the request and complaint to Martin Hayden, editor of The Detroit News, and introduced Mr. Ferry to him.

"6. Neither I nor Mr. Hayden nor The Evening News Association had anything to do with the mailing of the request and complaint to the commission or its members. None of us distributed or published any copies of the letter or complaint. The only action taken by any of us was to publish, on Sunday, May 13, 1962, the attached Detroit News article concerning the request and complaint and Mr. Durant's comments thereon.

"7. Said article was written by me and was published by The Detroit News on the understanding that the request and complaint was that of Senator Stahlin to the Michigan fair campaign practices commission and had been sent to the commission on May 11, 1962. Before writing or publishing the article I called Mr. Durant and discussed the charges with him; the article contains his comments.

"8. At the time of the receipt of the copy of Senator Stahlin's request and complaint and at the time of the publication of The Detroit News article I did not believe that any of the statements contained in said request, complaint or article were false. I knew Senator Stahlin and had a high regard for his integrity, both personally and as a Michigan senator and candidate for lieutenant governor. In writing The Detroit News article I also relied upon this integrity and the assurance of Mr. Ferry that the charges made could be substantiated. My purpose

in writing The Detroit News article was to inform the public of the filing of Senator Stahlin's request and complaint, a matter which I considered to be of broad and genuine public interest and concern. I was acquainted with the plaintiff herein and I had no personal animosity or malice toward him. My article does not mention the plaintiff herein. In mentioning the Republican Voters Associated as a group named by Senator Stahlin I understood that this group was a national political organization having hundreds of members.

"FREDERICK G. ENGLE."

"I, Martin S. Hayden, being duly sworn, depose and say:

"1. I am and since prior to 1962 have been, the editor of The Detroit News, a public newspaper published by defendant The Evening News Association.

"2. I first saw Senator Stahlin's May 10, 1962 request that the fair campaign practices commission conduct a full-scale investigation into the activities of certain extremists groups in connection with the then forthcoming Republican primary election in Wayne county and the attached complaint (exhibit A to plaintiff's complaint) on Friday, May 11, 1962, when Senator Stahlin's press representative, Charles H. Ferry, delivered a copy thereof to the office of The Detroit News. I understood that there was a Michigan fair campaign practices commission, that Reverend Marshall R. Reed was its chairman, and that the persons shown as receiving copies of Senator Stahlin's request and complaint were the members of the commission. The commission conducted an investigation in response to the request and complaint.

"3. On May 11, 1962 Mr. Engle, a political writer for The Detroit News, brought a copy of Senator Stahlin's request and complaint to my office and introduced Mr. Ferry as Senator Stahlin's press representative who had delivered the copy to the News office. Mr. Ferry informed me that the request and complaint were being sent to the commission and copies were being delivered to the press.

"4. I had nothing to do with the mailing of the request and complaint to the commission or its members. I neither distributed nor published any copies of the letter or complaint. The only action taken by The Detroit News, Mr. Engle, or myself was the publication on May 13, 1962 of a

news article written by Mr. Engle concerning Senator Stahlin's request and complaint and Mr. Durant's comments thereon.

"5. At the time of the receipt of the copy of Senator Stahlin's request and complaint and at the time of the publication of The Detroit News article I did not believe that any of the statements contained in said request, complaint or article were false. I did not question, and had no reason to question, the integrity of Senator Stahlin and I relied upon his integrity. I considered the filing of the request and complaint, and the matters referred to therein, as matters of broad and genuine public concern. I was not acquainted with the plaintiff herein and had no personal animosity or malice toward him. The article published by the News does not mention the plaintiff herein. I understood that Republican Voters Associated was a national political organization having a large membership.

"MARTIN S. HAYDEN."

"John H. Stahlin, being duly sworn, deposes and says:

"1. I am a defendant in the above-captioned cause.

"2. I make this affidavit in support of my motion for summary judgment in this cause, having personal knowledge of the facts stated herein.

"3. In May, 1962, I was serving as a member of the Michigan State senate. As a member of the Republican party, I also was a candidate for the Republican nomination for lieutenant governor.

"4. As a State senator, member of the Republican party, and candidate for State office, I knew in May, 1962, that Michigan had a fair campaign practices commission, the members of which were appointed by the governor. I further knew that the Michigan fair campaign practices commission investigated complaints of inproper campaign practices and that the commission was officially charged with the responsibility of assuring that election campaigns in Michigan were conducted in accordance with American traditions of fair play.

"5. During the spring of 1962, I received information from Mr. Charles Ferry (a writer and research assistant employed by me), Mr. Paul Bagwell (a former Republican candidate for governor) and others concerning activities of certain groups in connection with the Republican party and a forthcoming primary election in Wayne county. Although

I did not have personal knowledge of all of this information, I in good faith believed that such information was true. Aware of my responsibilities not only as a State senator and a candidate for public office, but as an interested Republican and citizen, I believe it to be my duty to communicate this information to and file a complaint with the members of the Michigan fair campaign practices commission, the official group responsible for investigating such charges. On that basis this information was communicated to the Michigan fair campaign practices commission in substantially the form of exhibit A attached to the complaint in the above-captioned action. At the time of such communication I, in good faith, believed that the information contained in said exhibit A was true, and I still believe it to be true.

"6. At the time of said communication I also believed that the information contained in said exhibit A was a matter of vital public interest involving very basic threats to the political processes and that Republicans and the public generally should be advised of this information as soon as possible.

"7. In communicating the information in said exhibit A to the Michigan fair campaign practices commission and certain of the news media, I acted in complete good faith and with the conviction that such information was true and that in my position I had the responsibility and obligation to bring this information to their attention.

"8. At no time have I acted with any ill will or malice toward plaintiff in this cause, whose name was listed in said exhibit A as a person associated with Republican Voters Associated. It was my good faith belief that the plaintiff had first-hand knowledge of some of the information contained in said exhibit A and could testify to that effect before the Michigan fair campaign practices commission. To the best of my information and belief, no news article or other releases in connection with the filing of said exhibit A with the Michigan fair campaign practices commission have mentioned plaintiff's name.

"JOHN H. STAHLIN."

"Paul D. Bagwell, being first duly sworn, deposes and says that he is one of the defendants herein, that he has personal knowledge of the facts stated herein; and that, if

sworn as a witness, he can testify competently to the facts contained herein.

"Deponent further says that:

"1. In 1958 and 1960 he was the candidate of the Republican party for the office of governor for the State of Michigan; that as such he was, in May, 1962, the titular head of the Republican party in the State of Michigan; that in such capacity, during and prior to May, 1962, he conferred with numerous officials, candidates and would-be candidates for State, county and local offices and for offices within the Republican party itself and that he received numerous written reports and requests for money from many of such persons and others on their behalf.

"2. On or about May 8, 1962, deponent received in his office in the Penobscot Building, Detroit, Michigan, one, Karl B. McKeehan, a long-time Republican worker and leader in the 13th Congressional District. Mr. McKeehan came into deponent's office without prior appointment and delivered to deponent two documents. The first document was entitled '13th in trouble as follows' and consisted of two pages; the second document was entitled 'Delegate Expenses' and consisted of two pages. During McKeehan's visit, deponent wrote in his own hand on the first page of the document entitled '13th District in trouble as follows' the information following the names of the persons listed in items I and VI on said page and also wrote in his own hand the name 'George Zimmerman — 14th,' opposite item II on said page and the names 'Clive Hull — Birch, 459 Prentiss' and 'John A. Smith, Birch, 382 Pilgrim, Highland Park' opposite item IV on said page, which information he obtained from said McKeehan.

"3. Shortly prior to McKeehan's visit, deponent had received from defendant Norman Stockmeyer, Wayne county, Republican chairman, a half-page carbon copy of a document entitled 'Greetings — Greetings,' with a query as to whether deponent knew anything about George Lincoln Rockwell and his connection with the American Nazi party.

"4. On May 10, 1962 deponent was visited in his office in the Penobscot building by defendants John H. Stahlin and Charles Ferry. At that time defendant Stahlin was a duly elected Republican member of the Senate of the State of Michigan and a candidate for the office of lieutenant governor of the State of Michigan. Defendant Stahlin at

that time indicated that he had uncovered certain practices which he thought were harmful to the Republican party and that he had made a decision to file such charges with the fair campaign practices commission, a commission theretofore duly appointed by the governor of the State of Michigan. At that time, in response to such statement, deponent turned over to said defendants a copy of the document entitled '13th in trouble' and of the half-page document entitled 'Greetings — Greetings' previously received as set forth above. These documents were retyped in deponent's office on May 10 1962, including the handwritten notations deponent had made in his conference with Karl B. McKeehan and a carbon copy was delivered to said defendants Stahlin and Ferry. A copy of the material so delivered to defendants Stahlin and Ferry is attached hereto as exhibit 1.

"5. At that meeting, Senator Stahlin indicated he had already made up his mind to bring the matter to the attention of the fair campaign practices commission and deponent turned over the document (exhibit 1 attached hereto) for the sole purpose of having the allegations therein contained brought to the attention of the fair campaign practices commission and with the sole expectation that such allegations would be investigated by such commission along with any other allegations which were going to be investigated.

"6. Deponent had no knowledge that defendants Stahlin and Ferry or any other person intended to or would publish the contents of said document other than as set forth above; he did not authorize publication other than as set forth above; and he delivered said document solely for the purpose of having such allegations investigated by the fair campaign practices commission, duly constituted for such purpose. Deponent never saw exhibit A attached to plaintiff's complaint at any time prior to its publication and deponent had no prior knowledge of its contents or that it would be published other than as set forth above.

"7. Deponent did not know that the allegations set forth in the material turned over by him to defendants Stahlin and Ferry were false and did not act with malice towards plaintiff or any other person but solely as one with an interest in the subject matter of such document and with good faith for the sole purpose of having an investigation made of the statements therein contained by

the duly authorized and constituted public authorities. Deponent had no knowledge of and did not authorize any other use of such document.

"8. Plaintiff has at no time requested this deponent to retract any statements made by him.

"Further deponent sayeth not.

"Paul D. Bagwell."

EXHIBIT 1*

May 8, 1962

13TH IN TROUBLE
AS FOLLOWS:

CHALLENGE DURANT'S POLITICAL ACTION and HIS SECRETIVE BIRCHITES and THEIR ASSOCIATES:

I. Durant's Ultra-Conservatives—Birchites—Extremists 14th District R.V.A. Liuetenant Flying Squadron

   a. Pete Heneen—14th
   b. Earl Tinseman—14th
   c. William Crapo—14th
   d. William Bell—15th
   e. Charles Grady—1st Dist. Chg. of Delegates
   f. Allen B. Clink—15th
   g. William Brooks—1st
   h. Walter Jones—1st
   i. Walter Morrow—1st
   j. John Smith—15th

II. George Lincoln Rockwell, Inc., Geo. Zimmerman—14th U.S.A. Nazi's Fascist Party

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*Exhibit 1 to the affidavit of Paul D. Bagwell was apparently inadvertently omitted upon the printing of the advance sheets of Michigan reports. It is part of the record.

III. K.K.K., known as the Sons of America

IV. Independent America Party—Birchites and Rebels: Clive Hull—Birch, 459 Prentiss; John A. Smith—Birch, 382 Pilgrim, Highland Park

V. Kent Jennings and his Associates, 4446 Cass Avenue, Office 247, known as the Sons of America

VI. Durant's Rebels Organization, headed by Robert Robbins

a. Truman Castle—13th (Birch)

b. Robert Roberts—13th (KKK)

c. Truman Reed—15th

d. Alfred Jackson—15th

e. Joseph Bell—15th

f. Don Martin—15th

g. Edward Patterson—14th

h. James Evans—15th

i. Finnis Braham—15th

j. James Anderson—14th

k. William Coash—13th

l. John Lane—13th

m. Martin Bass—13th

The above mentioned are the ones that are getting Delegates in the 13th Congressional District. As of this date (May 8th) their organization has completed 90% of the 191 Precincts. In this District, they have been holding weekly meetings—some of which have been held at 932 Edison Avenue, 4446 Cass Avenue, Office 247, Veterans Memorial Building and other various places.

These parties have stooped pretty low, by stealing the Petitions of the Candidates, which we have placed at different locations and by sending some of their Flying Squadron with information saying that they were sent by us.

These Petitions were picked up on Monday, April 30, 1962. One particular instance is that of Grover Leaster, residing in Ward 3, Precinct 11, who was one of the people that lost his Petition to the Durant organization.

The opposition has been intimidating our Candidates for Delegate, by calling them on the telephone, and in person. They have a telephone committee of 5 colored women and 5 white women. The name of one of the women is Hazel Willis.

IF Republican Leaders are interested in George Romney *NOW* is the time to stop Durant and his Flying Squadron.

The sum of $1,900.00 is *NEEDED* to complete this job in 15 days, which is for the sake of the Party—not mine, but I will do the work if I have the ammunition.

(Copy of Bulletin distributed)

GREETINGS *GREETINGS*

The George Lincoln Rockwell Delegates Inc. U.S.A. invites you to become a delegate in your precinct to represent your party for purpose of strengthening the party's defense against Communism.

The Rockwell Delegates Corp. U.S.A. is a National organization dedicated to defend America against Communism. Consider your patriotic position in your community.

Be a Rockwell Delegate
Non-Partisan Participation

PS. Watch for further announcements regarding activities in your area.

"Charles Ferry, being duly sworn, deposes and says:

"That he is one of the defendants in the above entitled cause, and that he has testified on deposition in the case of Durant v. Stahlin, et al., #328,488 to some of the matters involved in the above cause; that if sworn as a witness, he can testify competently to the facts contained in this affidavit.

"That during the spring and summer of 1962 deponent was in charge of the publicity on behalf of defendant John

Stahlin, who was a candidate for the office of lieutenant governor on the Republican ticket for the State of Michigan, and that in the course of this duty he was in close and constant communication with defendant John Stahlin.

"That prior to May 10, 1962, defendant Stahlin told deponent that he had conversation and discussions with various party leaders and others, including Bill Kulsea of the Booth Newspapers, who had recommended to defendant Stahlin that he go after Richard Durant and attack him publicly.

"That defendant Stahlin informed deponent that Stahlin had talked to Martin Hayden, editor of The Detroit News, at the office of the News, and was told that if said Stahlin would make a public attack against Richard Durant, he would have the editorial support of The Detroit News in his campaign for lieutenant governor; that the first test for the News' support was the candidate's position on Durant, that such a public attack against Durant would help get rid of Durant in the 14th Congressional District, and therefore the News would support said Stahlin; that with his *quid pro quo* in mind, this deponent and defendant Stahlin began to get serious about taking some action as suggested.

"That deponent and defendant Stahlin then began to accumulate information which could be used in an attack on Richard Durant, and that deponent talked to Richard Van Dusen, Norman Stockmeyer, Elly Peterson, Jack Gibbs, Donald DeRosen, Glenn Engle and others to get such information and to see what their reactions were to such an attack.

"That prior to writing exhibit A, deponent talked to Glenn Engle of The Detroit News, and informed him that defendant Stahlin would in the future be making some sort of attack against Durant; that Engle then requested that The Detroit News be given a 'beat' on it because it 'was the only paper which was really after the Durant thing;' and that a determining factor in deponent's decision to write exhibit A was the knowledge that The Detroit News would give defendant Stahlin editorial support if he made the public attack.

"That deponent knew defendant Stahlin was under pressure from The Detroit News and others in the Republican party to take this action against Durant; that deponent had frequent discussions with Glenn Engle and other representatives of The Detroit News — for example, Robert Poppa, Carl Rudow and Will Muller — and knew of Martin

Hayden's attitude toward Richard Durant; that deponent knew from his conversations with Elly Peterson, Richard Van Dusen, Jack Gibbs, Norman Stockmeyer, Donald DeRosen and others that defendant Stahlin would get the support of the 'Romney crowd' if there was considerable publicity attached to his name in the publicity of these charges to be made against Richard Durant.

"That the subject of the attack, and the gossip to be used to make this attack (which later took the form of exhibit A) were discussed by deponent with Elly Peterson, Norman Stockmeyer, Jack Gibbs, Donald DeRosen, Richard Van Dusen, Herman McKinney, Paul Bagwell, Glenn Engle, and others in the Republican party, including then State Senator Stanley Thayer; that all of the above, with the possible exception of Stanley Thayer, confirmed the accuracy of the gossip which was later used in exhibit A; that all of them recommended that the attack on Richard Durant be made; and that Glenn Engle was compiling a file on all these things, the existence of which was another factor in deponent's decision to write exhibit A.

"That the strategy of using a complaint with the fair campaign practices commission to make the attack was specifically approved of by Jack Gibbs, Elly Peterson, Glenn Engle and Paul Bagwell and Norman Stockmeyer.

"That at some of deponent's regular meetings with defendant Stahlin in April, 1962, it was known and discussed that someone from the Ford Motor Company had gone down to Washington to induce Senator Barry Goldwater to denounce Richard Durant so that Durant would be cut off from the certain amount of respectability that being a supporter of Goldwater then had, and that this effort was undertaken as a planned part of the attempt to oust Durant from his position of leadership in the Republican party in the 14th District, which resulted eventually in the publication of exhibit A; that prior to May 10, 1962, at some of the 'dump Durant' meetings in Lansing with defendant Stahlin and others, the 'word' was out that Allen Merrill, a vice preseident of the Ford Motor Company, had said to 'get' Durant.

"That on Thursday, May 10, 1962, deponent and defendant Stahlin had a meeting with Paul Bagwell at the office of Paul Bagwell in the Penobscot building in Detroit, which lasted an hour to an hour and a half; that the primary purpose of the meeting was to get the advice of Paul Bagwell on the desirability and wisdom of making a public attack against Richard Durant; that deponent and defendant Stah-

lin knew that Bagwell was leading a group in the 14th District to oust Richard Durant; that the meeting discussed the situation in the 14th District in relation to ousting Durant; that Bagwell confirmed the accuracy of the information deponent and defendant Stahlin had been compiling and told them of the activities of his group, the Republican Action Committee; that Paul Bagwell said his group was also compiling information about Richard Durant; that Bagwell gave, without a request on the part of deponent or defendant Stahlin, certain documents which were used in exhibit A; that Bagwell was extremely enthusiastic about the plan to attack Durant through the fair campaign practices commission and said 'This would be a good thing for the party and our efforts (in the 14th District) and a good thing for you, John.'

"That at this meeting Paul Bagwell said that this proposed attack through the FCPC had 'good possibilities' and it would help his group in their job of ousting Durant in the 14th District; that certain members of the Republican Action Committee (including George Bashara, Jr. and John Feikens) were digging on their own to get more of this sort of information to use in an attack on Richard Durant; that Bagwell strongly urged deponent to talk to said Bashara and Feikens before deponent made his public attack because they had additional charges 'to scorch your hair', but that deponent did not talk to them because he had to get exhibit A written in time to get it published in The Detroit News on Sunday, May 13, 1962.

"That deponent and defendant Stahlin believed the information given them by Paul Bagwell; that Bagwell told them his group would continue to investigate Durant and would come out with a further attack of their own subsequent to the publication of exhibit A, consisting of further disclosures of wrongdoing by Durant; that the purpose of these further disclosures, on the heels of exhibit A, was to give it 'the old one, two'; that the information deponent and defendant Stahlin had, which Bagwell confirmed, was already in the possession of George Bashara, Jr., and John Feikens, who were working on still more things; that deponent had certain notes of the gossip he had heard from others which he discussed at this meeting with Paul Bagwell, which Bagwell confirmed, and which was later used in exhibit A.

"That Bagwell, in his meeting and conversation with deponent and defendant Stahlin, was acting as a spokesman for the Republican Action Committee and his organized

effort to oust Durant; that he consistently used the word 'we' in his references to the proposed attack and the efforts being made in conjunction with deponent's proposed disclosures; that Bagwell informed deponent and defendant Stahlin that it was 'a nasty situation' and 'something had to be done about it' and 'we are right behind you'; that going through the FCPC was much better than getting up on a podium or issuing a press release denouncing Durant, that this procedure lent it a little more dignity and substance and gave it a structure for the charges to be aired; that the action deponent and defendant Stahlin were proposing was consistent with what the Republican Action Committee was doing in the 14th District and that it would help the Republican Action Committee with their job; that the said Bagwell was the acknowledged leader of the anti-Durant-conservative movement in the 14th District; that in this meeting Bagwell made reference to the fact that he was working with others to accomplish their joint purpose of ousting Durant by attacks on Durant such as exhibit A; and that the material Bagwell gave deponent and defendant Stahlin was to be used as they saw fit, without any strings on it or requests having been made for it.

"That Bagwell assured deponent and defendant Stahlin they had the support of Bagwell and his associates in the publication and dissemination of the attack which later took the form of exhibit A, and that the Republican Action Committee would 'soon come forth' with additional disclosures of the same sort.

"That when deponent left Bagwell's office, after this meeting on May 10, 1962, he had no doubt whatsoever in his mind, as a result of the conversation with Bagwell, that the plans of deponent and defendant Stahlin to make the attack on Durant through exhibit A would be relayed by Bagwell to other members of the Republican Action Committee and other people, not formally members of RAC but interested in seeing such an attack made.

"That Bagwell was most enthusiastic, as a spokesman for his group, that somebody like deponent and defendant Stahlin were trying to 'flush out' Durant through such disclosures as were used in exhibit A; that this would be very beneficial to the interest of Bagwell's group; that in the area of disclosing information to deponent and defendant Stahlin, Bagwell was speaking for his group.

"That subsequent to leaving Bagwell on May 10, 1962, deponent returned to Lansing and wrote exhibit A, using material from the following sources:

"From Paul Bagwell—almost all of pages 2 and 3; forthcoming additional disclosures; improper use of party funds; racism and anti-Semitism; telephone intimidation; tampering with petitions; deceitful literature; meeting places and individual names; corroborating witnesses; general confirmation of all other items.

"From Glenn Engle—threats of physical violence, including the knife point incident; racism and anti-Semitism; corroborating witnesses; buying of candidates; general confirmation of all other items.

"From Donald DeRosen—threats of physical violence; improper use of party funds; buying of candidates; tampering with petitions.

"From Herman McKinney—threats of physical violence; intimidation; racism and anti-Semitism; corroborating witnesses.

"From Jack Gibbs—buying of candidates; improper use of party funds; general confirmation of all other items.

"From Norman Stockmeyer—improper use of party funds; threats of physical violence; buying of candidates; tampering with petitions; general confirmation of all other items.

"From nearly every facet of party leadership not heretofore mentioned—general confirmation of most if not all items. (By party leadership, deponent means a series of continuing conversations with individuals mentioned herein and others who expressed their alarm over the possibility of Richard Durant becoming chairman of Wayne county and supplied or confirmed gossip used in the preparation of exhibit A).

"That Paul Bagwell, at the meeting with deponent and defendant Stahlin hereinabove referred to, said that he had turned the information he presented to them over to George Romney and had urged Romney to make the disclosures earlier, but that Romney had refused, which refusal Bagwell characterized as an error, and that the reason Bagwell gave the material to deponent and defendant Stahlin was that it would help Bagwell and his associates in their coordinated and formally organized and sophisticated efforts to oust Durant from his position in the 14th District.

"That after writing exhibit A on the night of Thursday, May 10, 1962, deponent delivered copies to defendant Stahlin in the early morning of Friday, May 11, 1962, and

then went directly to see Glenn Engle at the offices of The Detroit News; that an overriding consideration in writing exhibit A was to get publicity; that it was the concensus of deponent, Paul Bagwell and others that using the appeal to the fair campaign practices commission was a matter of publicity mechanics; that this was the most beneficial route to follow in terms of defendant Stahlin's position as a candidate; that filing charges before a government body is an event which was newsworthy, that deponent did not intend to, nor did he, mail a copy of the complaint to the fair campaign practices commission until after he had 'cleared' the timing with The Detroit News and made sure 'the skids were greased' there; that he wanted the Sunday circulation for the airing of the charges and would have held off making the charges public if The Detroit News could not have given him space that day; that he made the charges public when he did because the newspaper strike had just ended—there was no point in taking action if the papers were not publishing; and that defendant Stahlin, Glenn Engle and The Detroit News were aware of these factors in his decision to make the charges at this time.

"'Deponent further says that when he presented exhibit A to Glenn Engle, Engle skimmed over it and said, 'I had better check with the head man on this' indicating to the deponent that the decision as to whether to publicize it was too weighty for him to make alone; that Engle then took exhibit A to Martin Hayden, and that shortly thereafter deponent was also brought by Engle into Hayden's office; that Hayden released deponent from 'our' exclusive, saying he wanted this story to have the widest possible publicity—'You are free to distribute this to other media'; and that deponent did not mail a copy of exhibit A to the fair campaign practices commission until after he had left a copy or copies with The Detroit News.

"That copies of exhibit A were mimeographed prior to deponent's visit to Glenn Engle aforesaid, and that after deponent's visit to The Detroit News, he gave copies to the Associated Press, United Press and The Detroit Free Press; that at least one copy was given on that Friday, May 11, 1962, prior to the appearance of the story about the charges on Sunday, May 13, 1962, to one Sarah Luedders (who had no connection with any news media) in the expectation that it would find its way into Durant's hands; that the rest of Friday and Saturday were spent in dis-

tribution of copies; that after Sunday, May 13, 1962, copies were given to a 'standard' PR mailing list, and to other individuals not connected with news media who requested copies, including members of the Republican State Central Committee; and that deponent was aware by Sunday, May 13, 1962, that Bishop Marshall Reed, the chairman of the fair campaign practices commission, had not received any copies of exhibit A by that day, and mailed him additional copies so that the FCPC received its copy well subsequent to May 13, 1962.

"That this widespread distribution, including the distribution to The Detroit News, was with the approval and knowledge of defendant Stahlin.

"That subsequent to the publication of exhibit A, deponent was informed by Arthur Elliott that it would be okay for him to use the threat of action by the banking commissioner against Durant; that a suit was started against Durant in Newberry, Michigan, which was publicized; that prior thereto, deponent was informed by Paul Bagwell that there would be some sort of action forthcoming regarding Durant's personal business transactions; and that defendant Stahlin informed deponent that Charles Slay, the banking commissioner, was in touch with defendant Stahlin, giving Stahlin information about Durant's personal business dealing with various banks of which Durant was a director, and had informed defendant Stahlin that the banking department was also 'going to get' Durant.

"And further deponent saith not.

"CHARLES FERRY"

T. E. BRENNAN, C.J., and DETHMERS, BLACK, and ADAMS, JJ., concurred.